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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 49

UNITED STATES, PETITIONER,

vs.

VIRGINIA ELECTRIC AND POWER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 3, 1960
CERTIORARI GRANTED APRIL 18, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

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[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7882

UNITED STATES OF AMERICA, Appellant,

v.

2979.72 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF HALIFAX, VIRGINIA, OLIVE VAUGHAN WILLIAMS, ET AL., AND UNKNOWN OWNERS, Appellees

Appeal from the United States District Court for the Western District of Virginia

Appendix for the United States

COMPLAINT—Filed October 23, 1952

"1. This is an action of a Civil nature brought by the United States of America, at the request of the Secretary of the Army, for the taking of property under the power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is stated in Exhibit "A" hereto attached and made a part hereof.

3. The uses for which the property is to be taken are stated in Exhibit "B" hereto attached and made a part hereof.

[fol. 2] 4. The interest or estate to be acquired in the property in this proceeding is stated in Exhibit "C" hereto attached and made a part hereof.

5. The property so to be taken is described in Exhibit "D" here to attached and made a part hereof.

6. The persons having or claiming, or who may have or claim an interest in the property, whose names are ascertainable by a reasonably diligent search of the records and those whose names have otherwise been learned, are:

List of Owners and Possible Parties Defendant for each Tract in Condemnation Proceeding entitled U. S. Against

2979.72 Acres of Land in Halifax County, Virginia, et al., & Unknown Owners—John H. Kerr Dam and Reservoir.

Tract No. FF-3100 E

Olive Vaughan Williams, John R. Williams, Jr., her husband, Halifax, Va.

Heirs, Devisees, personal representatives, creditors and assigns of Hannah N. Vaughan, deceased, Addresses Unknown.

Heirs, devisees, personal representatives, creditors, and assigns of W. T. Harris, deceased, Addresses Unknown.

Heirs, devisees, personal representatives, creditors, and assigns of D. F. Harris, deceased; Addresses Unknown.

7. In addition to the defendants hereinbefore named, the following are also made defendants in this action, under the designation "Unknown Owners":

[fol. 3] The heirs, devisees, personal representatives, creditors and assigns of each defendant, herein named or described, who may be now deceased.

The guardian, committee or other representative of each defendant, herein named or described, who may be an infant or incompetent.

8. The following parties may have or claim an interest in the property by reason of taxes and assessments on the property, or liability of the property for assessments and taxes:

Treasurer of Halifax County, Virginia;
Clerk of the Circuit Court of Halifax County, Virginia;
and Commonwealth of Virginia.

9. In addition to the persons named, there are or may be others who may have or claim some interest in the property to be taken, whose names are unknown to the plaintiff and on diligent inquiry have not been ascertained; and they are made parties to this action under the designation "Unknown Owners".

10. Contracts determining the amounts of just compensation payable by the plaintiff have been entered into with persons named in Exhibit "E" hereto attached and made a part hereof.

Wherefore the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

Howard C. Gilmer, Jr., United States Attorney.
By (S.) W. O. Chatterton, Special Attorney, Department of Justice.

[fol. 4] Trial by jury of the issue of just compensation is demanded by plaintiff.

Howard C. Gilmer, Jr., United States Attorney.
By (S.) W. O. Chatterton, Special Attorney, Department of Justice.

Address of the plaintiff's attorney: 205 Federal Building, Lynchburg, Virginia.

EXHIBIT "A" TO COMPLAINT

The authorities for the taking are:

Act of Congress approved February 26, 1931 (46 Stat. 1421; 40 U.S.C. 258a) and Act supplementary thereto and amendatory thereof;
Acts of Congress approved April 24, 1888 (25 Stat. 94; 33 U.S.C. sec. 591), and March 1, 1917 (39 Stat. 948; 33 U.S.C. sec. 701);
Act of Congress approved December 22, 1944 (Public Law 534—78th Congress, 2nd Session); and
Civil Functions Appropriation Act, 1953, approved July 11, 1952 (Public Law 504—82nd Congress, 2nd Session)

EXHIBIT "B" TO COMPLAINT

The property to be taken in this action is necessary to provide adequately for the establishment of a flood control project and for other public uses incident thereto. The said property has been selected by the Secretary of the

Army of the United States of America for use in connection with the establishment of the John H. Kerr Dam and Reservoir on the Roanoke River in Virginia and North Carolina, and for such other public uses as may be authorized by Congress or by Executive Order and is required for immediate use,

[fol. 5] EXHIBIT "C" TO COMPLAINT

The interests or estates to be acquired in this proceeding are the following:

* * * * * * * *

(b) The full, complete, and perpetual right, power and privilege to overflow, permanently or intermittently, as may be necessary as a result of the construction, maintenance and operation of the John H. Kerr Dam and Reservoir, Tract No. EF-3100E, Pars. A, B, C, D, E and F, together with the right, power and privilege to go upon the lands involved from time to time as the occasion may require to accomplish any activities in connection with the maintenance and operation of the John H. Kerr Dam and Reservoir and to remove from said lands natural or artificial structures or obstructions which, in the opinion of the representative of the United States in charge, may be detrimental to the maintenance and operation of said project, reserving, however, to the owner(s) and their assigns, all such rights and privileges as may be used and enjoyed without interfering with or abridging the rights and easements acquired by the United States, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipelines.

EXHIBIT "D" TO COMPLAINT

* * * * * * *

Tract No. FF-3100E

PARCEL A

All that certain tract or parcel of land lying and situate in Roanoke Magisterial District, Halifax County, Virginia, bounded and described as follows: Beginning at a point in the center of Bannister River at a common corner with

[fol. 6] lands of Paul C. Edmunds on the north; thence, with the lands of Paul C. Edmunds north 40° 10′ east 2341 feet; thence, with the lands of W. J. Smith south 02° 40′ east 320 feet, south 05° 05′ west 445 feet and north 75° 00′ east 659 feet to an iron pin on a contour line having an elevation of 330 feet above mean sea level as determined from the Sea-level Datum of 1929 through the medium of the Southeastern Supplementary Adjustment of 1936 by the United States Coast and Geodetic Survey; thence, a new line of division with the lands of Hannah N. Vaughan generally southwesterly, northeasterly, and northerly along the said 330 foot contour line as it meanders approximately 22,500 feet to an iron pin on Mrs. R. A. Smith line; thence, with the lands of Mrs. R. A. Smith south 62° 35′ east 50 feet and north 73° 35′ east 158 feet to the center of Peters Creek; thence, generally northerly and upstream along the center line of Peters Creek as it meanders approximately 715 feet to the center of Virginia State Road No. 716 being a common corner with lands of B. J. Smith and Katherine Smith and the lands of Paul C. Edmunds; thence, off the creek with the lands of Paul C. Edmunds northeasterly along the center line of Virginia State Road No. 716 as it meanders approximately 350 feet to a point on the aforesaid 330 foot contour line, thence, again a new line of division with the lands of Hannah N. Vaughan very generally southerly, easterly then northeasterly along the said 330 foot contour line as it meanders approximately 33,000 feet to an iron pin on Paul C. Edmunds line; thence, with the lands of Paul C. Edmunds north 87° 40′ east 1096 feet and north 15° 35′ east 250 feet to an iron pin on the aforesaid 330 foot contour line; thence, again a new line of division with the lands of Hannah N. Vaughan very generally southeasterly along the said 330 foot contour line as it meanders approximately 68,000 feet to an iron pin [fol. 7] on Paul C. Edmunds line; thence, with the lands of Paul C. Edmunds south 05° 40′ west 236 feet and south 08° 15′ east 1248 feet to the low water line along the northeast bank of the Dan River; thence, northwesterly and upstream along the low water line of the northeast bank of the Dan River as it meanders approximately 26,800 feet to the mouth of the Bannister River; thence, northwesterly then northerly and upstream along the center line of the

Bannister River as it meanders approximately 7,720 feet to the point of beginning, containing 1762.8 acres, more or less, and

Being a part of the land conveyed to Hannah N. Vaughan by the following deeds: Deed from Falkland Estate, Inc., dated October 26, 1926, and recorded in the Office of the Clerk of the Circuit Court of Halifax County, Virginia, in Deed Book 139, page 564; deed from Jesse Hill and Elanor Hill, his wife, dated May 26, 1940, and recorded in said Clerk's Office in Deed Book 161, page 218; and deed from Selina J. Boxley and John Boxley, her husband, dated March 12, 1941, and recorded in said Clerk's Office in Deed Book 162, Page 539.

PARCEL B

All that certain tract or parcel of land lying and situate in Red Bank Magisterial District, Halifax County, Virginia, the same being an island in the Dan River known as Pollards Island, the eastern end of said island is located opposite the mouth of Hyco River and the same lies south of and opposite the lands of the said Hannah N. Vaughan known as the Falkland Estate and contains 44.4 acres, more or less, and

Being a part of the land conveyed to Hannah N. Vaughan by a deed from Falkland Estate, Inc., dated October 26, 1926, and recorded in the Office of the Clerk of the Circuit Court of Halifax County, Virginia, in Deed Book 139, page 564.

[fol.'8] PARCEL C

All that certain tract or parcel of land lying and situate in Red Bank Magisterial District, Halifax County, Virginia, the same being an island in the Dan River immediately northwest of Pollards Island and south of and opposite the lands of the said Hannah N. Vaughan known as the Falkland Estate and contains 21.2 acres, more or less, and

Being a part of the land conveyed to Hannah N. Vaughan by a deed from Falkland Estate, Inc., dated October 26, 1926, and recorded in the Office of the Clerk of the Circuit Court of Halifax County, Virginia, in Deed Book 139, page 564.

PARCEL D

All that certain tract or parcel of land lying and situate in the Red Bank Magisterial District, Halifax County, Virginia, the same being an island in the Dan River immediately north of Pollards Island and south of and opposite the lands of the said Hannah N. Vaughan known as the Falkland Estate and contains 7.2 acres, more or less, and

Being a part of the land conveyed to Hannah N. Vaughan by a deed from Falkland Estate, Inc., dated October 26, 1926, and recorded in the Office of the Clerk of the Circuit Court of Halifax County, Virginia, in Deed Book 139, page 564.

PARCEL E

All that certain tract or parcel of land lying and situate in Roanoke Magisterial District, Halifax County, Virginia, bounded and described as follows: Beginning at a point on the line dividing lands of Hannah N. Vaughan on the west and lands of Annie B. Edmunds on the east, said point [fol. 9] is south 05° 25′ east 990 feet, measured along said dividing line from the northwest corner of the said lands of Annie B. Edmunds, said point of beginning is further identified as located on a contour line having an elevation of 330 feet above mean sea level as determined from the Sea-level Datum of 1929 through the medium of the Southeastern Supplementary Adjustment of 1936 by the United States Coast and Geodetic Survey and is the northeast corner hereof; thence, with the lands of Annie B. Edmunds south 12° 36′ 06″ west 619.60 feet to a point on the aforesaid 330 foot contour line; thence, a new line of division with the lands of Hannah N. Vaughan generally northwesterly then easterly along the said 330 foot contour line as it meanders approximately 1730 feet to the point of beginning, containing 3.6 acres, more or less, and

Being a part of the land conveyed to Hannah N. Vaughan by a deed from Selina J. Boxley and John Boxley, her husband, dated March 12, 1941, and recorded in the Office of the Clerk of the Circuit Court of Halifax County, Virginia, in Deed Book 162, page 539.

PARCEL F

All that certain tract or parcel of land lying and situate in Roanoke Magisterial District, Halifax County, Virginia,

bounded and described as follows: Beginning at a point on the line dividing the lands of Hannah N. Vaughan on the west and the lands of Annie B. Edmunds on the east, said point of beginning is south 05° 25′ east 990 feet, south 12° 36′ 06″ west 619.60 feet, south 02° 42′ 06″ west 718.57 feet and south 21° 00′ 10″ west 83.93 feet measured along said dividing line from the northwest corner of the said lands of Annie B. Edmunds, the said point of beginning is further identified as located on a contour line having an elevation of 330 feet above mean sea level as determined [fol. 10] from the Sea-level Datum of 1929 through the medium of the Southeastern Supplementary Adjustment of 1936 by the United States Coast and Geodetic Survey and is the northeast corner hereof; thence, with the lands of Annie B. Edmunds south 27° 31′ 44″ west 92.40 feet to a point on the aforesaid 330 foot contour line; thence, a new line of division with the lands of Hannah N. Vaughan northwesterly then easterly along the said 330 foot contour line as it meanders approximately 780 feet to the point of beginning and containing 0.8 of an acre, more or less, and

Being a part of the land conveyed to Hannah N. Vaughan by a deed from Selina J. Boxley and John Boxley, her husband, dated March 12, 1941, and recorded in the Office of the Clerk of the Circuit Court of Halifax County, Virginia, in Deed Book 162, page 539.

Being in all a total of 1840 acres, more or less.

EXHIBIT "E" TO COMPLAINT

Tract No. FF-3100E, Parcels A, B, C, D, E, & F.

Optionors: Olive Vaughan Williams and John R. Williams, her husband, Halifax, Virginia.

IN UNITED STATES DISTRICT COURT

DECLARATION OF TAKING—Filed October 23, 1952

I, Frank Pace, Jr., Secretary of the Army of the United States, do hereby declare that:

1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved Feb-

ruary 26, 1931 (46 Stat. 1421; 40 U.S.C. Sec. 258a), and Acts supplementary thereto and amendatory thereof; under the further authority of the Acts of Congress approved April 24, 1888 (25 Stat. 94; 33 U.S.C. Sec. 591), and [fol. 11] March 1, 1917 (39 Stat. 948; 33 U.S.C. Sec. 701), which Acts authorize the acquisition of land for flood control purposes; the Act of Congress approved December 22, 1944 (Public Law 534—78th Congress, 2d Session), which Act authorized the construction and operation of the John H. Kerr Dam and Reservoir, formerly known as the Buggs Island Reservoir, on the Roanoke River in Virginia and North Carolina, under the direction of the Secretary of the Army and supervision of the Chief of Engineers; and the Act of Congress entitled "Civil Functions Appropriations Act, 1953", approved July 11, 1952 (Public Law 504—82nd Congress, 2d Session), which Act appropriated funds for such purposes.

(b) The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for the establishment of a flood control project and for other public uses incident thereto. The said lands have been selected by me for use in connection with the establishment of the John H. Kerr Dam and Reservoir on the Roanoke River in Virginia and North Carolina, and for such other public uses as may be authorized by Congress or by Executive Order and are required for immediate use.

2. A general description of the lands being taken is set forth in Schedule "A" attached hereto and made a part hereof and is a description of the same lands described in the complaint in the above entitled cause.

3. The estates taken for such public uses are as follows:

* * * * * * * *

(b) The full, complete, and perpetual right, power and privilege to overflow, permanently or intermittently, as may be necessary as a result of the construction, maintenance and operation of the John H. Kerr Dam and Reser- [fol. 12] voir, Tract No. FF-3100E, Pars. A, B, C, D, E and F, together with the right, power and privilege to go upon the lands involved from time to time as the occasion may require to accomplish any activities in connection with the maintenance and operation of the John H. Kerr

Dam and Reservoir and to remove from said lands natural or artificial structures or obstructions which, in the opinion of the representative of the United States in charge, may be detrimental to the maintenance and operation of said project, reserving, however, to the owner(s) and their assigns, all such rights and privileges as may be used and enjoyed without interfering with or abridging the rights and easements acquired by the United States, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipelines.

4. The plan showing the lands taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said lands with all buildings and improvements thereon and all appurtenances thereto, including any and all interests hereby taken in said lands, is set forth in Schedule "A" hereof, which sum I cause to be deposited herewith in the Registry of this Court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said lands will probably be within any limits prescribed by law as to the price to be paid therefor.

In witness whereof, the plaintiff by its Secretary of the Army, thereunto authorized, has caused this Declaration of Taking to be signed in its name by said Frank Pace, Jr., Secretary of the Army, this 26th day of September, A. D. 1952, in the City of Washington, District of Columbia.

(S.) Frank Pace, Jr., Secretary of the Army.

SCHEDULE "A" TO DECLARATION OF TAKING

[fol. 13] The land which is the subject matter of this Declaration of Taking and of this condemnation aggregates 2979.72 acres, more or less, situate and being in the County of Halifax, State of Virginia. A description of the lands taken together with a list of the purported owners thereof and a statement of the sum estimated to be just compensation therefor, is a follows:

Tract No. FF-3100E

Parcel A

All that certain tract or parcel of land lying and situate in Roanoke Magisterial District, Halifax County, Virginia, bounded and described as follows: Beginning at a point in the center of Bannister River at a common corner with lands of Paul C. Edmunds on the north; thence, with the lands of Paul C. Edmunds north 40° 10′ east 2341 feet; thence, with the lands of W. J. Smith south 02° 40′ east 320, south 05° 05′ west 445 feet and north 75° 00′ east 659 feet to an iron pin on a contour-line having an elevation of 330 feet above mean sea level as determined from the Sea-level Datum of 1929 through the medium of the Southeastern Supplementary Adjustment of 1936 by the United States Coast and Geodetic Survey; thence, a new line of division with the lands of Hannah N. Vaughan generally southwesterly, northeasterly, and northerly along the said 330 foot contour line as it meanders approximately 22,500 feet to an iron pin on Mrs. R. A. Smith line; thence, with the lands of Mrs. R. A. Smith south 62° 35′ east 50 feet and north 73° 35′ east 158 feet to the center of Peters Creek; thence, generally northerly and upstream along the center line of Peters Creek as it meanders approximately 715 feet [fol. 14] to the center of Virginia State Road No. 716 being a common corner with lands of B. J. Smith and Katherine Smith and the lands of Paul C. Edmunds; thence, off the creek with the lands of Paul C. Edmunds northeasterly along the center line of Virginia State Road No. 716 as it meanders approximately 350 feet to a point on the aforesaid 330 foot contour line, thence, again a new line of division with the lands of Hannah N. Vaughan very generally southerly, easterly then northeasterly along the said 330 foot contour line as it meanders approximately 33,000 feet to an iron pin on Paul C. Edmunds line; thence, with the lands of Paul C. Edmunds north 87° 40′ east 1096 feet and north 15° 35′ east 250 feet to an iron pin on the aforesaid 330 foot contour line; thence, again a new line of division with the lands of Hannah N. Vaughan very generally southeasterly along the said 330 foot contour line as it meanders approximately 68,000 feet to an iron pin on Paul C. Edmunds line; thence, with the lands of Paul C. Edmunds south 05° 40′ west 236 feet and south 08° 15′ east 1248 feet

to the low water line along the northeast bank of the Dan River; thence, northwesterly and upstream along the low water line of the northeast bank of the Dan River as it meanders approximately 26,800 feet to the mouth of the Bannister River; thence, northwesterly then northerly and upstream along the center line of the Bannister River as it meanders approximately 7,720 feet to point of beginning, containing 1762.8 acres, more or less, and

Being a part of the land conveyed to Hannah N. Vaughan by the following deeds: Deed from Falkland Estate, Inc., dated October 26, 1926, and recorded in the Office of the Clerk of the Circuit Court of Halifax County, Virginia, in Deed Book 139, page 564; deed from Jesse Hill and Elanor Hill, his wife, dated May 26, 1940, and recorded in said [fol. 15] Clerk's Office in Deed Book 161, page 218; and deed from Selina J. Boxley and John Boxley, her husband, dated March 12, 1941 and recorded in said Clerk's Office in Deed Book 162, Page 539.

PARCEL B

All that certain tract or parcel of land lying and situate in Red Bank Magisterial District, Halifax County, Virginia, the same being an island in the Dan River known as Pollards Island, the eastern end of said island is located opposite the mouth of Hyco River and the same lies south of and opposite the lands of the said Hannah N. Vaughan known as the Falkland Estate and contains 44.4 acres, more or less, and

Being a part of the land conveyed to Hannah N. Vaughan by a deed from Falkland Estate, Inc., dated October 26, 1926, and recorded in the Office of the Clerk of the Circuit of Halifax County, Virginia, in Deed Book 139, page 564.

PARCEL C

All that certain tract or parcel of land lying and situate in Red Bank Magisterial District, Halifax County, Virginia, the same being an island in the Dan River immediately northwest of Pollards Island and south of and opposite the lands of the said Hannah N. Vaughan known as the Falkland Estate and contains 21.2 acres, more or less, and

Being a part of the land conveyed to Hannah N. Vaughan by a deed from Falkland Estate, Inc., dated October 26, 1926, and recorded in the Office of the Clerk of the Circuit Court of Halifax County, Virginia, in Deed Book 139, page 564.

PARCEL D

[fol. 16] All that certain tract or parcel of land lying and situate in Red Bank Magisterial District, Halifax County, Virginia, the same being an island in the Dan River immediately north of Pollards Island and south of and opposite the lands of said Hannah N. Vaughan known as the Falkland Estate and contains 7.2 acres, more or less, and

Being a part of the land conveyed to Hannah N. Vaughan by a deed from Falkland Estate, Inc. dated October 26, 1926, and recorded in the Office of the Clerk of the Circuit Court of Halifax County, Virginia, in Deed Book 139, page 564.

PARCEL E

All that certain tract or parcel of land lying and situate in Roanoke Magisterial District, Halifax County, Virginia, bounded and described as follows: Beginning at a point on the line dividing lands of Hannah N. Vaughan on the west and lands of Annie B. Edmunds on the east, said point is south 05° 25' east 990 feet, measured along said dividing line from the northwest corner of the said lands of Annie B. Edmunds, said point of beginning is further identified as located on a contour line having an elevation of 330 feet above mean sea level as determined from the Sea-level Datum of 1929 through the medium of the Southeastern Supplementary Adjustment of 1936 by the United States Coast and Geodetic Survey and is the northeast corner hereof; thence, with the lands of Annie B. Edmunds south 12° 36' 06" west 619.60 feet to a point on the aforesaid 330 foot contour line; thence, a new line of division with the lands of Hannah N. Vaughan generally northwesterly then easterly along the said 330 foot contour line as it meanders [fol. 17] approximately 1730 feet to the point of beginning, containing 3.6 acres, more or less, and

Being a part of the land conveyed to Hannah N. Vaughan by a deed from Selina J. Boxley and John Boxley, her husband, dated March 12, 1941, and recorded in the Office of the Clerk of the Circuit Court of Halifax County, Virginia, in Deed Book 162, page 539.

PARCEL F

All that certain tract or parcel of land lying and situate in Roanoke Magisterial District, Halifax County, Virginia,

bounded and described as follows: Beginning at a point on the line dividing the lands of Hannah N. Vaughan on the west and the lands of Annie B. Edmunds on the east, said point of beginning is south 05° 25′ east 990 feet, south 12° 36′ 06″ west 619.60 feet, south 02° 06″ west 718.57 feet and south 21° 00′ 10″ west 83.93 feet measured along said dividing line from the northwest corner of the said lands of Annie B. Edmunds; the said point of beginning is further identified as located on a contour line having an elevation of 330 feet above mean sea level as determined from the Sea-level Datum of 1929 through the medium of the South-eastern Supplementary Adjustment of 1936 by the United States Coast and Geodetic Survey and is the northeast corner hereof; thence, with the lands of Annie B. Edmunds south 27° 31′ 44″ west 92.40 feet to a point on the aforesaid 330 foot contour line; thence, a new line of division with the lands of Hannah N. Vaughan northwesterly, then easterly along the said 330 foot contour line as it meanders approximately 780 feet to the point of beginning and containing 0.8 of an acre, more or less, and

Being a part of the land conveyed to Hannah N. Vaughan [fol. 18] by a deed from Selina J. Boxley and John Boxley, her husband, dated March 12, 1941, and recorded in the Office of the Clerk of the Circuit Court of Halifax County, Virginia, in Deed Book 162, page 539.

Being in all a total 1840 acres, more or less.

NAMES AND ADDRESSES OF PURPORTED OWNERS:

Olive Vaughan Williams	Halifax, Virginia
John R. Williams, Jr., her husband	Halifax, Virginia
Heirs, devisees, personal representatives and assigns of Hannah N. Vaughan, deceased	Addresses Unknown
Heirs, devisees, personal representatives and assigns of W. T. Harris, deceased	Addresses Unknown
Heirs, devisees, personal representatives and assigns of D. P. Harris, deceased	Addresses Unknown
ESTIMATED COMPENSATION:	$1.00

In United States District Court

Amended Answer of the Defendant Virginia Electric and Power Company to Plaintiff's Motion for Judgment—Filed September 29, 1953

The Third Defense of the Answer of the Defendant, Virginia Electric and Power Company, is amended to read as follows:

Third Defense

(1) This Defendant claims that it owns *riparian, water and floodage rights* upon approximately 6,000 acres of the land designated in this proceeding as Tract No. FF-3100E, by virtue of (a) the deed from Falkland Estate, Incorporated, to Middle Virginia Power Company, dated October 14, 1925, recorded in Deed Book 136, page 227, in the Clerk's [fol. 19] Office of the Circuit Court of Halifax County; a photostat copy of said deed was filed with this Defendant's original answer marked "Exhibit C"; (b) the deed from Hannah N. Vaughan to Middle Virginia Power Company, dated January 3, 1942, recorded in Deed Book 164, page 84, in the Clerk's Office of the Circuit Court of Halifax County, a photostat copy of said deed was filed with this Defendant's original answer marked "Exhibit D"; and that the aforementioned *riparian, water and floodage rights* were acquired by this Defendant in the following manner:

(i) By deed from Middle Virginia Power Company to Virginia Public Service Company, dated June 8, 1942, recorded in Deed Book 164, page 557, in the Clerk's Office of the Circuit Court of Halifax County; and in Deed Book 190, page 73, in the Clerk's Office of the Circuit Court of Campbell County; and

(ii) Virginia Public Service Company merged into Virginia Electric and Power Company on May 26, 1944; and

(c) the *riparian, water and floodage rights* which were acquired by South Boston Electric Light and Power Company (i) by deed from Banister-Dan Mills Company, dated May 1, 1907, recorded in Deed Book 103, page 181, in the Clerk's Office of the Circuit Court of Halifax County, a photostat copy of said deed was filed with this defendant's original,

answer marked "Exhibit E"; (ii) by deed from J. J. Lawson, et al., dated May 1, 1907, recorded in Deed Book 103, page 183, in the Clerk's Office of the Circuit Court of Halifax County, a photostat copy of an attested copy of said deed was filed with this Defendant's original answer marked "Exhibit F"; and (iii) were reserved by South Boston Elec-[fol. 29] tric Light and Power Company in its deed to Falkland Estate, Incorporated, dated January 19, 1920, recorded in Deed Book 125, page 378, in the Clerk's Office of the Circuit Court of Halifax County, a photostat copy of an attested copy of said deed is attached hereto marked "Exhibit G"; and (iv) which *riparian, water and floodage rights* of South Boston Electric Light and Power Company were subsequently acquired by this Defendant in the manner set forth in Paragraph 8, Section (a) of the Plaintiff's Motion for Judgement [italics added].

* * * * * * *

IN UNITED STATES DISTRICT COURT

INTERROGATORIES ADDRESSED BY THE UNITED STATES, AS PLAINTIFF, TO DEFENDANT VIRGINIA ELECTRIC POWER COMPANY, FILED OCTOBER 2, 1953, PURSUANT TO RULE 33, F.R.C.P.

The defendant, Virginia Electric and Power Company, is requested to answer the following interrogatories in accordance with Rule 33 of the Federal Rules of Civil Procedure:

1. Do you concede that the following is an accurate statement of the rights claimed by you under the following instruments?

(a) The rights claimed by you in Tracts Nos. FF-3100E and BB-2739 arising out of the deeds from Banister-Dan Mills Co. dated May 1, 1907, (your Exhibit E), and from J. J. Lawson, et al, dated May 1, 1907 (your Exhibit F), both to your predecessor in title, South Boston Electric Light and Power Co., and as reserved by that company in its deed to Falkland Etate, Inc., dated January 19, 1920, (your Exhibit G), are as follows:

Water rights, water power and water privileges, including the right to construct and maintain a dam or

dams or other works on said land and to raise the water [fol. 21] at the head of the Hyco Falls in the Dan River 6 ft. above the usual water level without compensation for damages caused thereby;

(b) The rights claimed by you in Tract No. FF-3100E arising from the deed from Falkland Estate, Inc. of October 14, 1925, (your Exhibit C), with the deed of correction from Hannah N. Vaughan of January 3, 1942, (your Exhibit D), in connection with the deeds therein referred to, are as follows:

The right to build and rebuild any dam or dams across the Dan River at any point or points desired so that the normal water level behind said dam or dams shall not be higher than 8 ft. with all riparian rights, water rights, easements and rights of floodage to the fullest extent of said water level of 8 ft. so far as it affects the property of Falkland Estate, Inc., (Tract No. FF-3100E); also, the right in perpetuity, free of charges, to abut dams, build power houses, use adjoining lands for construction purposes, and to take sand, gravel, stone, or other construction material for such purposes with all necessary rights of way for ingress and egress; the right to establish rights of way for transmission and telephone lines, 100 ft. in width, upon paying therefor $20.00 per acre, and the right to occupy and use land contiguous to dam abutments and power houses for dwellings and outbuildings for operatives of the plant or plants upon payment of $40.00 per acre.

2. If your answer to question No. 1 is no, please state in detail the rights you claim under the instruments set out in question No. 1.

3. Has Virginia Electric and Power Company, or its predecessors in title, ever constructed or begun to construct [fol. 22] any dam, plant, work or structure of any kind or character in connection with such rights claimed by it? If so, please give details.

4. Do you contend that your rights and easements claimed in connection with Tracts Nos. FF-3100E and BB-2739 constitute an integrated dam or power site? If so, please give details.

5. (a) Do you contend that such rights in Tracts Nos. FE-3100E and BB-2739 had value for dam or water power

purposes on October 23, 1952, or within a reasonable time prior thereto or thereafter?

(b) If so, have you or your predecessors in title made any plans, specifications, surveys or engineering studies upon which you intend to rely and offer in evidence?

(c) If so, please list the same and attach copies thereof to your answer hereto or advise where such plans may be available to plaintiff for inspection and reproduction.

6. If you consider or claim that your easements and rights in connection with Tracts Nos. FF-3100E and BB-2739 have value for dam or water power purposes, please state in connection with what dam or dams and give the following information concerning them: (a) the location and height; (b) the head; (c) the normal elevation of the tail water; (d) the maximum power pool elevation and the planned draw-down; (e) the regulated flow in cubic feet per second; (f) the maximum power pool elevation plus surcharge and the land or land rights not owned by you which would have to be acquired in connection therewith.

7. Of the deeds alleged in Paragraph 10 of the plaintiff's motion for judgment and admitted in Paragraph 4 of the first defense in your answer thereto, do you rely on the [fol 23] following deeds for your claimed flowage interests in the following tracts: (a) from Royal R. Scott, et al, dated February 28, 1905 for Tract No. JJ-3528; (b) from Elizabeth Gray, et al, dated May 6, 1903 for Tracts Nos. JJ-3507, JJ-3508 and JJ-3509 (c) from Joseph Stebbins, Jr., Special Commissioner, et al., dated December 24, 1913 for Tracts Nos. JJ-3514, JJ-3515, JJ-3516, JJ-3517, JJ-3529, and JJ-3531?

8. Are the photostatic copies of the deeds listed in question No. 7 and all the deeds attached as Exhibit A to amendment to plaintiff's motion for judgment true and correct?

9. Is it correct that the dam across the Dan River formerly existing between Tracts Nos. JJ-3537A and JJ-3537B, as described in Paragraph No. 8(b) of plaintiff's motion for judgment, and admitted in Paragraph 3 of the first defense of your answer thereto, was constructed between the years 1890 and 1905, to the best of your knowledge?

10. Is it correct that the date when said dam, described in question No. 9, became unfit for use, as set out in Paragraph 11 of plaintiff's motion for judgment and admitted

in Paragraph 4 of the first defense of your answer thereto, was about the year 1912 or 1913? If not, what year?

11. Do you contend that the flowage easements claimed by you over tracts in the JJ segment had value for dam and water power purposes on October 23, 1952, or any reasonable time prior thereto or thereafter?

12. If the answer to question No. 11 is yes, please state in connection with what dam or dams and give the following information concerning them: (a) the location and height; (b) the head; (c) the normal elevation of the tail water; (d) the maximum power pool elevation and the planned draw-down; (e) the regulated flow in cubic feet [fol. 24] per second; (f) the maximum power pool elevation plus surcharge and the land or land rights not owned by you which would have to be acquired in connection therewith.

13. Do you concede that no dam on the Dan River between Danville and Clarksville has been in operation since the year 1925?

14. If your answer to question No. 13 is no, please list any such dams.

15. Please state the locations of sources of the power you furnish to the Town of South Boston and the surrounding area, and whether such sources are hydro-electric or steam.

16. Give the approximate date or dates when the system or systems stated in answer to question No. 15 went into effect.

17. Do you concede that the Dan River is an interstate, navigable stream?

18. If you do not contend that any of claimed rights have value for dam or water power purposes, please state for what purpose or purposes they have value.

19. What do you contend is the proper measure of value of your claimed rights?

John Strickler, United States Attorney for the Western District of Virginia. By (S.) Murray A. Foster, Special Assistant to the United States Attorney. (S.) W. Braxton Miller, Attorney, Department of Justice.

[fol. 25] CERTIFICATE OF SERVICE BY MAILING
(Omitted in printing)

IN UNITED STATES DISTRICT COURT

ANSWERS BY DEFENDANT VIRGINIA ELECTRIC AND POWER COMPANY TO INTERROGATORIES ADDRESSED TO IT BY THE UNITED STATES, FILED NOVEMBER 3, 1953.

The defendant, Virginia Electric and Power Company, in accordance with Rule 33 of the Federal Rules of Civil Procedure files the following answers to the interrogatories addressed by plaintiff to this defendant, dated October 2, 1953:

(1) The statements of the rights claimed by this defendant in Tracts Nos. FF-1300E and BB-2739 set forth in plaintiff's question No. 1, paragraphs (a) and (b) are not accurate.

(2) The rights claimed by this defendant under the instruments set out in plaintiff's question No. 1 are as follows:

The rights, reserved by South Boston Electric Light and Power Company in its deed to Falkland Estate, Incorporated, dated January 19, 1920, insofar as said rights affect Tracts FF-3100E and BB-2739, are subordinate rights claimed by Virginia Electric and Power Company in these tracts, which underlie the less limited rights conveyed to [fol. 26] Middle Virginia Power Company by Falkland Estate, Incorporated, by deed dated October 14, 1925.

Under the instruments referred to, Virginia Electric and Power Company claims, insofar as said rights affect the Falkland property, in addition to the rights specifically enumerated therein, the right to build and to rebuild any dam or dams across the Dan River of any height it may desire and at any point or points it may desire, which would raise the water level of said River no higher than 8 feet above the usual water level at Rogers Island.

(3) No.
(4) No.
(5) (a) Yes.
(b) Yes.

(c) The engineering study of Slaughter, Saville & Blackburn, Incorporated, Engineers, Richmond, Virginia, dated November 12, 1941, will be made available to the plaintiff for inspection and reproduction at this defendant's offices at 7th and Franklin Streets, Richmond, Virginia.

(6) The information requested in plaintiff's question No. 6 is set forth in detail in the engineering study of 1941 referred to in answer No. (5)(c) above; however, the value for water power purposes of this defendant's rights in 1952, is not necessarily limited to the proposed dam in said study since this defendant, as stated in its answer No. (2), has the right to build and to rebuild any dam or dams across the Dan River of any height it may desire and at any points it may desire which would raise the water level of [fol. 27] said River no higher than 8 feet above the usual water level at Rogers Island.

(7) Yes; except in respect to Tracts Nos. JJ-3529 and JJ-3531 where this defendant relies upon the deed from Royal R. Scott, et al, dated February 28, 1905.

(8) Yes, to the best of our knowledge, information and belief.

(9) Yes

(10) No; the exact year is unknown but it is believed that said dam became unfit for use about the year 1927.

(11) Yes.

(12) Any dam or dams at any point downstream from South Boston of any height which might be built in the light of contemporary circumstances.

(13) No.

(14) We do not know.

(15) and (16) The locations of sources of hydroelectric or steam power furnished to the Town of South Boston and the surrounding area, and the approximate dates such sources went into effect are as follows:

1923 Halifax Hydro Station, Halifax, Virginia.
1925 Emporia Hydro Station, Emporia, Virginia.
1930 Cushwa Hydro Station, Snowden, Virginia.
1929 Balcony Falls Hydro Station, Glasgow, Virginia.
1926 Lock's Hydro Station, Petersburg, Va.

1926 Harvel Hydro Station, Petersburg, Va.
1926 Roanoke Rapids Hydro Station, Roanoke Rapids, N. C.
1928 Embrey Hydro Station, Fredericksburg, Va.
1930 Blandsford Hydro Station, Near Manassas, Va.
1926 Belle Isle Hydro Station, Richmond, Va.
1940 Park Hydro Station, Richmond, Va.
[fol. 28] 1926 Manchester Hydro Station, Richmond, Va.
1926 12th Street Hydro Station & Steam, Richmond, Va.
1944 Chesterfield Steam Station, Chesterfield County, Va.
1926 Reeves Ave. Steam Station, Norfolk, Va.
1953 Portsmouth Steam Station, Gilmerton, Va.
1941 Hampton Steam Station, Hampton, Va.
1948 Possum Point Steam Station, Quantico, Va.
1929 Alexandria Steam Station, Alexandria, Va.
1931 Bremo Steam Station, Bremo Bluff, Va.
1928 Roncerverte Steam Station, Roncerverte, W. Va.
1952 Kerr Dam Hydro Station, Mecklenburg County, Va.
About 1929 Power Stations of Carolina Power Co.
1950 Power Stations of Appalachian Electric Power Co.

(17) No.

(18) We claim that this defendant's rights have value for dam or water power development purposes.

(19) This defendant claims just compensation as measured by the market value of its flowage rights due to the location of the land involved and its availability, at the time of the taking and in the reasonably near future, for water power development purposes.

Virginia Electric and Power Company, By (S.) Francis V. Lowden, Jr., *Counsel.*

Certificate of Service by Mailing (Omitted in printing)

[fol. 29] IN UNITED STATES DISTRICT COURT

Excerpts from the Reporter's Transcript of Trial Proceedings

COLLOQUY BETWEEN COURT AND COUNSEL:

Mr. Miller [Government counsel]: May it please Your Honor, the Government's first contention is this. Under the stipulation of facts handed to Your Honor and filed in this case as of this date, signed by the attorneys for the United States and attorneys for the Virginia Electric and Power Company, dated the 18th day of January 1954, and under exhibits 1, 2, 3 and 4 attached thereto, and the respective deeds already before the Court and referred to therein, we contend that the only issue before Your Honor in this controversy between the United States on one side and VEPCo on the other, is the fee simple value of Tract JJ-3537A, and for these reasons:

First. It has appeared in the record, and I think the stipulation covers it by reference, that there is an agreement between the United States and the former fee owner of Tract FF-3100E as to the fee simple value, as to the value due the fee owner, for that tract in the sum of $1.00.

At this time I would like to file—of course, I cannot offer it in evidence now, but I would like to file with the clerk of the court and the Court, and in this case, a duly certified copy of the option agreement between the United States and Olive Vaughan Williams, which Mrs. Williams offered her interest in Tract FE-3100E for $1.00. The instrument being signed by Olive Vaughan Williams on [fol. 30] April 30, 1951, and accepted for the United States on May 31, 1951. I have that ready to file in court.

Mr. Ferrell [counsel for Vepco]: We have no objection to your filing at this time so we can get that straight.

Mr. Miller: All right. With the consent of everyone, then, I might introduce that in evidence now as a Government exhibit in this case, if there is no objection to being out of turn.

Mr. Ferrell: No objection.

Mr. Miller: To get that out of the way, then, I will ask that this option contract between Olive Vaughan Williams and the United States be marked.

[The option contract was received in evidence as Government Exhibit 1.]

Mr. Miller: Under that settlement or that option contract fee will be which is deposited in court.

The Court: Yes, sir.

Mr. Miller: That leaves nothing as will appear from the stipulation in VEPCo aside from Tract JJ-3537A, except certain rights set out in the stipulation by reference, which all have to do with water rights, water power, and water privileges, including the right to construct and maintain dams or other works on the lands referred to and described in the said stipulation.

There is one deed, the second deed mentioned in paragraph 10, I believe, of the stipulation—one deed we could not agree on its meaning, but it was confined, whatever its meaning is, to the right to dam water, water power rights and privileges and related rights to that.

Now, the Government's first position with respect to that is that under the taking in this case the land is being taken under the Flood Control Act of 1944 for benefit of flood control and navigation purposes pri-
[fol. 31] marily. Power, of course, also is involved. The courts hold that is immaterial.

Our first position is that, under the cases. And, second, the Dan River is an interstate navigable stream.

I think, may it please Your Honor, I think Your Honor could accept notice of that now as a judicial notice. There has been filed here before the Court the records of the state acts of Virginia, records of the federal court—I refer to the motion for pretrial conference—acts of the State of Virginia, acts of the State of North Carolina. In addition——

The Court: Supposing it is a navigable stream, what is the particular pertinency, Mr. Miller?

Mr. Miller: Based on that, then, we will say, under the rule—under the rule, and this is our primary position under the rule established, VEPCo having assigned from Tract JJ-3537A, having no rights except rights dependent upon

the flowage and the fall of an interstate navigable stream. Those rights are not private property as against the United States and they are not compensable in this action, and the authorities have been cited to Your Honor under points of the authorities in the support of our motion for pretrial conference. That ruling has not been made. We ask for the ruling now.

The ruling goes back to the Chandler Dunbar case, sustained by all of the circuit court of appeals cases; and without exception in any appeal at court that rule has never been deviated from. That is our first position in this case.

Our second position is that, under the stipulation and the facts before Your Honor—before I state the position, let me say that by stating these subsidiary points I do not want to be understood of waiving the primary point of navigation. We think that controls this case and should end the case. But a secondary point, subsidiary point, under the [fol. 32] stipulation before Your Honor, and under the exhibits before Your Honor, and under the composite segment map which is before Your Honor and I assume will be offered in evidence shortly, the Virginia Electric and Power Company does not have sufficient—have acquired sufficient rights, substantial enough portion of power rights, to show a reasonable probability of ever developing power rights on their property or acquiring the necessary lands in connection therewith.

The facts before Your Honor under stipulation and on the maps do not bring them in or give them a possibility of coming within the rule of the Powelson case. May it please Your Honor, if the Powelson case be extended to cover the holdings—such holdings as VEPCo has in this case, then all condemnors in such takings as these might just as well get prepared to pay the power values or have it adjudicated for every land owner that owns a substantial portion of the land on either side of the river. Not on both.

Mr. Ferrell: I hate to interrupt, but, may the Court please, we have gone over this two or three times—twice I am sure about, and we are here today to try the issues as we understand them of what the fair market value of the land involved is.

The Court: Yes.

Mr. Ferrell: We have the witnesses here who are men whose time I think could be better put to use by putting

them on the stand and having their testimony. And if Mr. Miller wants to argue this thing for the third or the fourth time, as the case may be, we can do it after the evidence is in. I cannot see how if is relevant as an opening statement to go over all of this that we have gone over before, unless His Honor wants to be refreshed as to what we talked about.

The Court: I remember you went into great length [fol. 33] before me in Harrisonburg and previously out here in November, if I am not mistaken.

Mr. Ferrell: Yes, sir.

Mr. Miller: May it please Your Honor, I am perhaps, being too full. I merely want to get our position clearly in the record and it will save time later on. I have one other point, later on, and I will be very brief and will avoid argument, because it is before Your Honor anyhow on the pretrial conference and points of authorities.

The last and subsidiary point, I want to call Your Honor's attention to the position of the Government, and relates also to the Powelson case, is that under the stipulation of facts all of the rights that VEPCo once had in the JJ segment, as shown on this composite segment map, are gone and have long been since abandoned as a matter of law, under the law which they were acquired. Abandoned as clear-cut law of the statutes and the court holdings of the State of Virginia.

With that, Your Honor, the Government at this time will take the position that any evidence—we ask for a ruling on pretrial conference and we ask for a ruling now—that there is no issue involved in this case between VEPCo and the United States except the fee simple value of Tract JJ-3537A.

The Court: Go ahead now, Mr. Ferrell.

. . . . . .

Direct examination of THOMAS C. CLARK, Vepco witness

Q. Would you tell us, please, sir, what, in your opinion was the fair market value on October 23, 1952, of the 1540 acres of land below contour 321, plus or minus, in Tract FF-3100E, exclusive of the merchantable timber of marketable size?

[fol. 34] The Court: You say exclusive?

Mr. Ferrell: Exclusive, yes, sir.

Mr. Miller: Objection, Mr. Clark. Objection, Your Honor, on the ground that the fee simple interest of no tract, no part of the Tract FF-3100E, is being taken. Only a flowage easement is being taken over FF-3100E, and its value for agricultural or underlying fee is not involved in this case.

The Court: Objection overruled.

Mr. Miller: May I state the additional ground that under the stipulation, United States Exhibit 1, the fee simple value of that tract is not involved in this case. Nothing but the value of VEPCo's flowage rights and water rights are involved. This witness is not qualified as to those. And, of course, we have stated our other objections. And the fee simple value, if it had been taken, would have nothing to do and entirely foreign to the value of VEPCo's land [sic].[1]

The Court: Mr. Miller, there is no use arguing those things repeatedly. Earlier in this proceeding, I ruled that the basis of valuation where a flowage easement was involved, which could be exercised to the full measure of the easement taken, was equivalent to the fee simple value of the property because the previous owners are completely deprived of its use. And I adhere to that ruling. You can make your exceptions, but there is no use in repeating the argument every time because I have considered it at length heretofore.

Mr. Miller: That is all I wanted. Objection to that ruling for the reasons stated and heretofore stated and made clear to the Court. And may it be understood that all objections run to the line and need not be repeated?

The Court: Yes, sir.

Mr. Ferrell: All right, Mr. Clark.

[fol. 35] A. I hate to have the question repeated, but I am sorry.

Mr. Ferrell: I will repeat it.

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[1] Wh. the word "land" is shown in the transcript, it appears that reference was being made to Vepco's interest in the land.

By Mr. Ferrell:

Q. What, Mr. Clark, in your opinion, was the fair market value, on October 23, 1952, of the 1540 acres of land below contour 321 in Tract FF-3100E, exclusive of the saw timber or merchantable timber, leaving the other stand of timber on that particular 1540 acres of land?

A. With the merchantable saw timber cut and removed from this land, I consider the land worth $45.00 per acre, or a total fee simple value of $69,300.00.

. . . . . .

Cross examination of THOMAS C. CLARK, Vepco witness.

By Mr. Miller:

Q. Mr. Clark, with respect to Tract FF-3100E, as I understand it, you were employed and requested to appraise with reference to that tract only its full market value, as though held in fee simple, for all purposes?

A. It's fee simple value, yes, sir.

Q. You were employed to appraise only the fee simple value?

A. That's correct.

Q. 1500 acres as described in Tract FF-1300E.

A. With the merchantable saw timber having been cut and removed; that is correct.

Q. With the exception of merchantable saw timber?

A. Yes, sir.

Q. Mr. Clark, as I understand it, you appraised that on the basis of that 1500 acres standing by itself?

[fol. 36] A. That is correct.

Q. And on the basis on which you were requested to appraise it, its chief value was for farm pasturage and the growing of timber?

A. I would say so, yes, sir.

Q. Aside from what you were requested to do, were you generally advertant to the fact—and I think it is generally stipulated in the record—that this 1500 acres is a part of a 7400 acre estate that has been used for many years as a private hunting and game preserve?

A. I knew it was a part of a far larger tract, yes, sir, prior to this government use of it. But, as such, I might

say, if you will permit me, that it would be worth substantially more than it is by itself.

Q. I think probably that is true. But I am coming to this. Are you generally familiar with that—have you any familiarity with that Vaughan estate?

A. I have been all over it, sir, and been to the buildings and all that.

Q. That is a most valuable and beautiful an estate, used by Mrs. Olive Vaughan Williams now and for many years past, and her family (Mrs. Vaughan) has a private hunting and game preserve; is that not true?

A. Yes, sir. But, if you will permit me, I would not refer to that as an estate. That is not an estate in the sense that that word is usually used to refer to country estates. That is not that. That is a wonderful hunting preserve and a wonderful timber growing preserve, but I would not call it a country estate.

Q. And that estate abounds and is used by deer and various kinds of birds and other wild life?

A. I would say so. And timber.

Q. And timber. And is used for that purposes?

A. Yes, sir. And now starting to raise some cattle on it.

Q. And some cattle?

[fol. 37] A. Yes, sir.

Q. If you had been requested to make an appraisal of that entire estate before and after, the entire estate before the date of the declaration of taking in this case, and then been requested to make an appraisal of that estate with this flowage easement imposed over it, to get the depreciation, your result might have been far different, mightn't it?

A. Well, as a part of the entire tract this 1540 acres is worth far more than the value I put on it. Far more.

Q. I am talking about the effect. Assuming that you had been instructed in this case that this land would be flooded permanently for a certain time of the year up to contour 302, and had looked into it and found that that left a valuable lake on these lowlands here in connection with that estate, you might have found a great enhancement of value?

A. Well, that would be an enhancement in value to the remainder.

Q. That is what I am talking about.

A. That would have nothing to do with this.

Q. That is altogether possible——

A. Yes, sir.

Q. —that that might, aside from any question of law, have resulted in a great enhancement in value to the remainder of this 7400 acre private hunting preserve?

A. It could enhance the value of the remainder, yes, sir.

Q. And you were not restricted or requested to look into that?

A. No, sir, I put a value on this 1540 acres, as and of and within itself, with the merchantable saw timber removed, cut and removed.

Q. Just as though it were a separate tract held in fee simple?

[fol. 38] A. That is correct, yes, sir.

Mr. Miller: That is all.

* * * * * * *

Mr. Miller: [Government counsel]: In view of the cross-examination's additional facts brought out, the Government renews its objection to this valuation and moves to strike the valuation of the witness on the ground that it has no probative value of any issue involved in the case.

May it please Your Honor, our arguments are not in the record. [The arguments were made during pre-trial proceedings.] May the record show that this point as to fee value or agricultural value has been thoroughly argued and the authorities thoroughly argued to the Court's full satisfaction, and perhaps beyond?

The Court: Yes, sir.

* * * * * * *

Direct examination of Armistead T. Harvie, Vepco witness.

Q. What, in your opinion, was the fair market value on October 23, 1952, of the 1540 acres of land below contour 321 on Tract FF-3100E, exclusive of merchantable saw timber?

Mr. Miller: Objection. Same objection as to the former witness, may it please Your Honor.

The Court: Yes, sir.

Mr. Miller: May they run to the line?

The Court: Yes, sir.

Mr. Miller: Thank you.

[fol. 39] A. I have valued the fee simple at $40.00 an acre for the 1540 acres, making a total of $61,600.00.

Cross examination of ARMISTEAD T. HARVIE, Vepco witness.

* * * * * * *

By Mr. Miller:

Q. Mr. Harvie, as I understand your evidence, you were instructed to make an appraisal of the fair market value of the 1500 acres, or thereabouts, below a certain contour in Tract FF-3100E as though it were an entirely separate tract to have in fee simple?

A. Yes, sir, I appraised the 1540 acres, what I considered would be the fee of it.

Q. And as an entirely and separate tract?

A. Yes, sir. I went over the other tract. I had to go through it to go to this tract at different points. But I appraised it at 1540 acres.

Q. But you were not employed to, and did not, appraise the entire 7400 acres of which this tract is a part?

A. No, sir. If I had of done it, if they had instructed me that, of course my appraisal of it would have been very much greater in connection with about 6,000 acres. It would — a much more valuable piece of land.

Q. Mr. Harvie, if you had been instructed to appraise the depreciation affect of a certain easement or flowage easement across a part of this Tract FF-3100E, either by itself or as a part of the estate, and you had been instructed that it would flood at certain times only to a certain elevation, and flooded above a certain elevation intermittently at certain periods of the year, and given the details of that, the result of your appraisal might have been entirely different, wouldn't it?

[fol. 40] Mr. Ferrell [counsel for Vepco]: If Your Honor please, I want to object to that question as being irrelevant and immaterial.

The Court: I did not catch the full import of the question. Will you read it, Mr. Lee?

(The last question was read.)

The Court: He may answer the question yes or no, whether it would have been different or not.

A. Well, I wasn't instructed to do it, and I went there to get the fee simple value of that property, the intrinsic value of it——

Q. That answers it.

A. That property was subject to a natural floodage. You could see where it had gone over it. And, so far as that, I considered that it was subject to natural flood.

Mr. Miller: Just one other question, may it please Your Honor.

Q. What date was it that you were down there?

A. October 23, 1953.

Mr. Miller: I think no further questions.

Mr. Ferrell: That is all. Thank you.

* * * * * * *

Mr. Miller: That is all.

MOTION TO STRIKE EVIDENCE AND DENIAL THEREOF

May it please Your Honor, in the light of cross-examination, the Government renews its objections and moves to strike the evidence of the witness on the grounds heretofore stated.

The Court: All right, sir. Motion is denied.

* * * * * * *

[fol. 41] Direct examination of JAMES E. EASLEY, witness for Vepco.

Q. Mr. Easley, did you represent, as counsel, Olive Vaughan Williams in the negotiation between her and the United States of America with respect to Tract FF-3100E?

A. I did.

Q. Did Olive Vaughan Williams, at the time of these negotiations, consider that VEPCo had the right to flood 1540 acres of that tract?

Mr. Miller: Objection.

The Court: Objection sustained. It is sustained on the theory that I do not care what Williams thought about it.

I have already ruled that they did have a right to flood. So, I do not care what Williams thought.

Mr. Lowden [counsel for Vepco]: Yes, sir. What I was leading up to, Your Honor, is this, that Mrs. Williams conveyed to the United States only the difference between 321 and 330, and that she intended that they would acquire the lower rights from us. And even if that is not true, what actually happened, if you say they got some rights from Mrs. Williams, from her they got the right to flood intermittently, but from us they are taking the right to flood it permanently, which is just what Mrs. Williams did not want them to get. But they are getting it from us. And the Government is trying to get it for nothing and Mrs. Williams would not give them that right.

Mr. Miller: May it please Your Honor, as to that the option and all of the transactions between Mrs. Williams and the United States, declaration of taking, stipulation between Mrs. Williams and the United States with respect to the declaration of taking, and the option contract they have as Government Exhibit 1, claim no dispute about them, [fol. 42] no reason for any construction. The Court can construe them, and, as Your Honor said, the intentions of Mrs. Williams, whatever they were, are utterly immaterial and foreign to any issue that could be involved in this case.

Mr. Ferrell: If we understand the Government's position correctly, he takes the position that under this agreement that they got all of the rights that were necessary over the entire tract of land and it is not necessary for them to acquire anything from the Virginia Electric and Power Company.

We take the position that under this option agreement is expressly says that this is conveyed subject to the rights of the Virginia Electric and Power Company.

Of course, if that contention is correct and the instrument clearly provides that, why we do not need to go any further than that. In the event the Court considers that there is a ambiguity there, then we submit that the evidence which we would like to put on now might be considered for the purpose of resolving that ambiguity, and for no other purpose. If he will agree with us that it says that we only convey to you the flowage rights above contour 321, why we would not go into this.

Mr. Miller: Your Honor, on the matter now before the Court, we say the option and the facts are in evidence. And on the construction, the instruments, I think, are unambiguous. I don't see how we could have a serious argument on that. But, be they ambiguous; I think there is not an ambiguity in one of them. But, if they were, the intention of Olive Vaughan Williams would be foreign to any part of the construction at the time. Her contract is in writing, the effect of it is in writing, and it is before the Court.

Mr. Ferrell: Your Honor, we do not want to burden the Court with unnecessary evidence.

The Court: Let me see that a minute.

Mr. Ferrell: The paragraph saying subject to the [fol. 43] water rights of the Virginia Electric and Power Company appears on page 4 of the option agreement.

If Mr. Miller will concede that under the option agreement the Government only acquires flowage rights that Virginia Electric and Power Company did not have then we will not offer any of the evidence that we should like to produce through Mr. Easley.

Mr. Miller. We acquired nothing under that option. We acquired that under the declaration of taking, and the option with regard to the declaration of taking between the parties is simply this. The Government took in this property a flowage easement as described in the declaration of taking, and Your Honor has construed that and made a rule on it, to which we are objecting. Mr. Easley agreed in that option contract, which is contract exhibit 1, that as to her interest in the property, what interest she had, she agreed to accept $1.00.

Now, the issue before the Court is whether the rights of the VEPCo, as stipulated in the stipulation filed in court by the parties this morning, and the inference there referred to, have any value or not; and what the value of Mr. Easley's interest in this property was is entirely foreign to any issue of VEPCo.

Mr. Lowden: If Your Honor please, we are not trying to establish what Mrs. Williams' property is worth at all. The purpose of our questions is to establish that from the river to contour 321 the only rights the United States is getting they are getting from us and not from anybody else. That is what I am trying to establish.

The Court: Hasn't the Court agreed with you on that for the last two or three months? Haven't I repeatedly said that those flowage rights there put you in the same position, so far as valuation is concerned, as if you had the fee? And I am trying to find out what it is worth.

[fol. 44] Mr. Lowden: All right, sir. We have no further questions.

Mr. Miller: No questions.

By the Court:

Q. Mr. Easley, when Mr. Vaughan originally conveyed this tract to—some power company?

A. It was his own power company. He organized it.

Q. It was his own; that is what I am getting at. He was not "dealing at arm's length" then so far as the sale was concerned?

A. No, sir, he was settling up the Falkland Estate and it was a large area of land that had no activity to the Estate and that was kept as sort of a personal asset. He was trying to settle up the Power Company and using Falkland, so far as it would go, to help in the establishment of the Power Company. At that time, the value of Falkland was nothing like it is now because it hadn't been developed. It has since been developed as a game preserve.

Q. When did the Virginia Electric and Power Company acquire it?

A. They acquired it when that company that he created, South Side Virginia Power Company, was absorbed in the Virginia Public Service Company, and the Virginia Public Service Company merged into the Virginia Electric and Power Company. In that way it grew into the present company.

Q. So far as your knowledge and connection with the transaction that is involved in this land, there is no time that you know of when a definite value was fixed for this particular tract of land or the flowage easement over it?

A. No, sir.

Q. I see.

A. Except, I think the Middle Virginia Power Company when the title to this property was conveyed to [fol. 45] another corporation. The Middle Virginia Power Company was set up by the Virginia Public Service Com-

pany to hold title to certain inactive properties, and they consisted of the water power rights they had on the Hyco Falls and Dan River, and the similar rights they had on the Staunton River at Two Falls, known as the Pucketts Falls or the Bookneal Falls, and the McKeiver Falls. And those rights, which were riparian rights, which were designed to control the power in those three sites, were conveyed to the Middle Virginia Power Company and held there awaiting the time when they might be developed. And my recollection is—I think this deed says—they issued 9500 shares——

Mr. Miller: Objection. Oh, I have objected to the statemnt of that stock transaction there, that deed and the other parts of that deed as nothing of any consideration as to that. I think the witness has already shown that it is purely a stock transaction.

A. (Con'd) It was purely a stock transaction.

Mr. Miller: Besides, it would be too remote.

Mr. Lowden: May I ask him a question?

Further direct examination.

By Mr. Lowden:

Q. Are you familiar with how much Virginia Public Service Corporation paid to the Middle Virginia Power Company and eventually to your client for those rights?

Mr. Miller: Objection.

A. I don't know.

The Court: You mean for the flowage rights?

Mr. Lowden: Yes, sir. And he said he was not familiar.

[fol. 46] A. (Con'd) It was a merger of corporations.

The Court: That is one of the things my question was directed to. If there was any transaction in the past where we could show where these flowage rights were bought for a specific sum, I think it has some pertinency in determining their value.

Mr. Lowden: Yes, sir. I should like to make this statement. We cannot prove it this morning because we did not come prepared to do so. But I think Your Honor may be able to judicially notice it because it is a finding of the Federal Power Commission, I think.

When South Side Electric Company was merged into Virginia Public Service Company they also acquired the Middle Virginia Power Company. The Middle Virginia Power Company was organized, as Mr. Easley said, to the Hyco Falls tract, the Pollard Mill tract, and the Pucketts Falls tract, and this little tract up at Rogers Island. There might have been one other small dam in there, I am not sure. When that was transferred to the Virginia Public Service Company, it came as a part of the South Side Electric Company, of which it was a subsidiary, as I understand it.

The valuation put on those water rights at that time was $997,000.00 and some odd dollars. My best information is that Virginia Public Service Company, in fact, paid roughly $1,000,000 for those rights, but I am not prepared to prove that this morning. They also gave some bonds, which I understand they also paid.

The Court: Of course, that included a great many other rights other than flowage over this immediate——

Mr. Lowden: It included about four or five tracts with a great deal of effort and time to try and see what they put on this one. A lot of the records have been destroyed and it is a very difficult job.

Mr. Miller: May it please the Court, with respect to [fol. 47] that, I was down at the Federal Power Commission last week and——

The Court: Mr. Miller, I do not think there is anything before the Court that is the subject of argument. These gentlemen have said——

Mr. Miller: I couldn't find from those records that he refers to whether 10 cents or what amount of money was put on these rights that are involved here.

The Court: They have just stated that they would not be able to do without a great deal of research. So there is nothing to argue about.

Mr. Lowden: Just one last question.

By Mr. Lowden:

Q. Does Mrs. Olive Vaughan Williams claim any of the monies other than the $1.00 provided for in your stipulation, out of the award of this Court in this proceeding?

A. She does not.

Q. For 3100E?
A. No, sir.

Mr. Lowden: That is all, sir.
Mr. Miller: That is all.

. . . . . .

Direct examination of LEONARD A. BLACKBURN, witness for Vepco.

. . . . . .

Q. Are you familiar with the flowage easements and other rights owned by Virginia Electric and Power Company in the tract designated in these proceedings as Tract No. FF-3100E, known as Falkland?

A. Yes, sir, I am.

Q. Will you state how you are familiar with those?

[fol. 48] A. Well, I was employed to make a valuation of this property, in which the Falkland tract was involved, and I found in making this study that the Falkland tract was purchased from the Falkland Estate by the Middle Virginia Power Company in exchange of stock of the Middle Virginia Power Company, which was later merged with the Virginia Public Service Company and later became the property of the Virginia Electric and Power Company through purchase of Virginia Public Service Company.

During the period of ownership by Virginia Public Service Company, detailed surveys, including a topographical survey of areas, based on the proposed construction of the hydroelectric stations at Hyco Falls, were made. These maps were completed from the standpoint of essential data, including property lines, ownership, and the areas or acreage between each five foot contour. A complete record of all of the land involved, the area between each contour, determined the area feet of storage.

From this data and the gauging station on the Dan River, we made a study to determine the economic value of the flowage rights of this property which was owned by the Virginia Public Service Company.

Mr. Ferrell [counsel for Vepco]: Mr. Miller, I have shown and furnished you a photostatic copy of the paper I am now asking the witness to identify.

A. (Con'd) This is a report made by Slaughter, Sa-

ville & Blackburn, showing the study of the water rights of the Middle Virginia Power Company, sites at Hyco Falls on the Dan River, Pucketts Falls and McIvor Falls on the Staunton River.

Q. What is the date of that report, sir?

A. November 12, 1941.

[fol. 49] Q. Did you participate in the formulation of that report?

A. I did, with Mr. Cecil Reid.

Mr. Ferrell: We offer this in evidence and ask that it be marked VEPCo Exhibit No. 1.

Mr. Miller: I want to examine it and state my objection.

The Court: What is the purpose of the introduction of that report?

Mr. Ferrell: It is to show that this Falkland tract was not just purchased in 1925 by these companies and never considered again. We do not offer this in evidence as establishing the value, as such, on October 23, 1952, but to show to the Court that this was considered in 1941 as having a value and that the floodage rights that we claim that we have on that land are such as could have been used and could be used in October 1952.

The Court: Does this report anywhere set a valuation on those flowage rights?

Mr. Ferrell: It does put a water power value, Your Honor, of $300,000.00, which we are not claiming in this case.

Mr. Miller: May I have a short conference with opposing counsel? I am trying to figure out what this is they are offering and identify it.

Mr. Ferrell: I cannot understand that. We furnished you photostat of that. We would——

Mr. Miller: If you would come here, I don't think it is, or it is much more.

Mr. Ferrell: It is as much because we had to put the whole report in. And the witness has stated that Pucketts Falls on the Staunton River and McIvor Falls on the Staunton River are not involved here. But we thought that if we took that portion of the report out you would object to it even more strenuously.

[fol. 50] Mr. Miller: May it please Your Honor, this instrument marked for identification, now being offered in

evidence, certainly is not being fully enough identified by the witness as of 1941 would be the evidence of economic feasibility in 1941 would have no materiality as to the economic feasibility in October of 1952. Certaigly there is nothing of value here.

Mr. Ferrell: We recognize that, Your Honor, and the witness will so state.

Mr. Miller: We object to it for that reason, and we will also object to it make the objection generally on power value and power consideration ran to the line, the general objections that we have stated.

Then, in addition, we object to this as having no probative value, and particularly that portion of it that purports to put any valuation on this particular tract of land as of November 1941.

We object to that and we object also because we do not think this witness has qualified it and made it competent for probative value in the case.

The Court: Do I understand that this report made up by the witness' firm for the Virginia Electric and Power Company shows the value of the properties that they own along in that vicinity, along the Dan River, we will say?

Mr. Ferrell: Yes, sir, in 1941.

The Court: As potential power sites——

The Witness: Beg your pardon, it was for the Virginia Public Service Company.

The Court: If it would undertake to isolate or set separately the value of these flowage rights in the land, it would be merely the opinion of someone and not merely the opinion of this witness. He might be simply handing in here what represents an opinion of somebody else.

Mr. Ferrell: I think he could answer that question. [fol. 51] The Court: I do not think there is any question that the rights had value, but I do not think that is any way of proving them. I think I will exclude that report.

Mr. Ferrell: May we ask him the question if it represents, for whatever it was worth at that time, in 1941, his opinion as to these rights involved on the Hyco development?

The Witness: Yes, it does represent my opinion, and it is based on not only a study of the water flowage, but we had prices on all equipment, we made preliminary designs of dams——

The Court: What we are interested in is the value of this land, as land.

The Witness: It does not establish the value of the land. We did not go into the value of the land at that time.

The Court: That is what I thought.

Mr. Ferrell. We would like to offer this in evidence and have the Court rule on it for whatever it is worth.

The Court. I think I will exclude it.

Mr. Ferrell: Could we have it marked "VEPCo Exhibit 1 Excluded"; and we would like to note our exception.

The Court: Yes, sir. I do not mind saying that I have no objection to you putting it in there, because I do not think it would help me any and I would probably pay no attention to it. At the same time, if I let it in, an upper court might think that I did pay some attention to it.

(The report was filed and marked "VEPCo Exhibit 1 Excluded.")

By Mr. Ferrell:

Q. Mr. Blackburn, what in your opinion was a fair market value of those flowage rights on October 23, 1952?

[fol. 52] Mr. Miller: Objection. I don't think he has qualified to give an opinion as to that in detail. And, besides that, he only gives the engineer study—he has not shown any basis at all for a valuation of these flowage rights involved here up to date.

The Court: I do not think he has qualified himself to speak as an expert on land values. As a matter of fact, if he did all of the other things he recited awhile ago, he was too busy to know anything about land values.

Mr. Ferrell: I have not asked him that. I asked him what in his opinion was a fair market value of those flowage rights on October 23, 1952, in Tract FF-3100E, the Falkland tract.

The Court: That is right. He would have to value it as related to a part of a potential power project.

Mr. Ferrell: Not necessarily. I do not think his answer would be that.

The Court: Long ago, I think that you, in a conference up before me in Harrisonburg, disavowed any intention based upon an integrated power property.

Mr. Ferrell: That is right. This witness would be a witness to that effect as an engineer. We are taking it from the standpoint of an hydroelectric engineer, not only from the standpoint of these two appraisers of land values, but this hydroelectric engineer will also tie in with their testimony.

The Court: He may answer it.

Mr. Miller: Another ground to the objection—because it is going to open up a field here that is going—I am thinking of time.

Mr. Ferrell: If you are interested in time, I will say now that unless the witness surprises me he is not going to talk about anything pertaining to integrated power site or the Powelson case.

Mr. Miller: I say this, Your Honor, first, and I would [fol. 53] not reiterate my objections to the power value, but this witness is qualified as a technical engineer. Now, first, I do not believe that engineering data and engineering and economic feasibility of it is market value. We haven't reached that. This witness, on his qualifications, and they are completely and fully stated, would be qualified to state whether there was—the VEPCo's rights, from an engineering standpoint, were fit for a power site or could be used for a power site.

He could also give the engineering data as to whether it would be economical to put one there, and the engineering data on it.

But to come in and throw just a broad valuation out here, without any valuation—also enters the real estate field and market without any foundation—is——

The Court: Gentlemen, if we were trying this case before a jury, I would be much more careful about the admission of this evidence. But I would rather let the evidence go in and not have a whole lot of argument about it. I will stop him if he says too much, and I probably won't pay much attention to him unless he talks about land values. I do not want to hear about electrical values, I want to hear land values.

Go ahead and answer his question.

A. I would like to put the question this way and change it to say What is the minimum fair market value of these rights on October 23, 1952? In my opinion——

Mr. Miller: May our objection run to the line?

The Court: Objection is overruled.

A. (Con'd) My opinion, the minimum fair market value, when all of the facts are analyzed, should not be less than the appraised value of the land being flooded. The rights that the Power Company has on this property should not be less than the appraised value of the land being flooded.

[fol. 54] By the Court:

Q. Less than the appraised value? You mean less than the fee value of the lands?

A. Whatever the appraised value is, Your Honor. I am not appraising the value of it.

Q. It depends on who is doing the appraising. What you mean to say, Mr. Blackburn, is that the rights amounted to substantially the value of the land?

A. That is exactly what I am saying.

The Court: That is the Court's theory.

By Mr. Ferrell:

Q. Mr. Blackburn——

Mr. Miller: Just a minute. We move to strike that answer because the witness, I don't think, is on a valuation but it is a conclusion of law. I don't—I object. I don't think it is necessary for this witness to sustain Your Honor.

Q. (Con'd) Why do you come to that conclusion, Mr. Blackburn?

A. Well, in 1944, I was employed to make a study for the Virginia Public Service Company to collaborate with Mr. Cecil Reid to determine the economic value of water rights at Byco Falls. Mr. Reid had collected certain basic data in connection with this. Due to ill health he had to give up any further work, and from this point on, I completed the economic study. We went to great details in preparing an estimate of the cost of the construction and operation costs as compared to steam generation, taking at that time the most economical station as to the Virginia Public Service Company station, which was Bremo.

The conclusions reached on this study were based on the general engineering facts and procedure in de-

[fol. 55] termining the value of water rights at a given height, with a record of stream flow over many years. The location of this development at the time this study was made could have served two purposes. First, of course, would be the generation of kilowatt hours. The second was a question of regulation—not of stream flow, but the electric transmission lines of the Virginia Public Service Company's system, although the second point was not given any economic value. This point was later corrected by the installation of a synchronous condenser.

I am generally familiar with the Roanoke River basin from Roanoke, Virginia, through North Carolina, and I have made appraisals of hydro property on the river and we have studied the economic value. During this period, that is, from 1941 to 1[illegible] there have been many developments and improvements——

Mr. Miller: I think I will object to this point. He has certainly answered the question.

Mr. Ferrell: He is going to make the statement now, if I understand it correctly, that this study does not have any bearing. If you would not interrupt him, I think you would like the testimony.

Mr. Miller: He continues subject to my motion to strike because he is getting far beyond anything I remember he was to go.

The Court: Go ahead.

A. (Con'd) During this period, that is, from 1941 to '53, there have been many developments and improvements in the generation of power and also the growth of electric utilities. I would, therefore, not consider our 1941 report as a criterion of value of these flowage rights in 1952, regardless of the very conservative approach that we had to the problem. And when I say conservative, I have included in the cost of generation, the fixed charges of a [fol. 56] steam generating plant, which of course is a system such as Virginia Public Service Company was then and what the Virginia Electric and Power Company is now. It would give us an entirely different approach.

I, therefore, would like to state that the study in 1941 is not a criterion of value in 1952, nor does it make sense to value these rights on the basis of a re-return on hydroelectric plants which has already been flooded by a dam of such

magnitude below Hyco Falls that it leaves only the one fact that the perpetual right to flood this area up to elevation 321, more or less, had taken it right out of the land involved and becomes part of a development much greater in magnitude, and has forever eliminated the possibility of consideration of the value of flowage rights, other than the appraised value of the land.

I think further that the flowage rights, as such, have value because of the demand for same. And whether it was acquired for hydro-electric purposes, which is certainly the case in the Government's acquisition of same, or whether we consider the general conditions which always had been potentialities for industrial development in the paper or chemical industries, which require large volumes of water, or whether we consider the diminishing supply of available surface water for the essentials of area developments, this site meets all of the requirements for industrial developments: a large supply of water: a large storage——

The Court: I am afraid I am going to have to interrupt this. I thought we were going to get a brief answer as to why he thought the flowage rights—the value of the flowage rights represented substantially the value of the land itself. I do not want all of that talk about industrial sites and potential valuations based on that.

Mr. Ferrell: It is to show that there is a demand, may the Court please, for water rights, as such, in this particular [fol. 57] area, and that these water rights so to speak, were not on a mountain top, and flowage rights were not on a mountain top.

The Court: You gentlemen are not willing to accept the ruling of the Court when the Court has ruled with you. For the last two or three months, I have ruled with you that the value of these flowage rights was the fee simple value of the land. And you all want to come along and keep on proving it.

Mr. Ferrell: We thought Your Honor would want some testimony in the record to that effect.

The Court: I do not think I need anything to support my opinion. Maybe you need something to support yours.

Mr. Ferrell: We did not want to bring — to Newcastle, if Your Honor please. We wanted to make it as short as possible, as Mr. Blackburn is our last witness.

The Court: All right.

Mr. Ferrell: I think we are through with him now. Thank you, Mr. Blackburn.

* * * * *

Mr. Miller: Have you rested?

Mr. Ferrell: Yes, sir.

MOTION OF UNITED STATES TO STRIKE EVIDENCE AND DENIAL THEREOF

Mr. Miller: At the close of the Virginia Electric and Power Company's evidence, the Government moves to strike all evidence except that relating to the value of Tract 3537A, under the stipulation of parties this day filed in the evidence, for the reasons and grounds heretofore stated.

The Court: Motion is denied.

Mr. Miller: May it please Your Honor, I might say this, Your Honor. I have some formal offers to make of record [fol. 58] evidence, and I believe I can close here between an hour or hour and a half. If you make it an hour or two hours to give me a little more room.

The Court: All right, sir, we have all afternoon, the rest of the week.

Mr. Miller: I will almost guarantee not to take all afternoon.

The subject of motion to strike has now been overruled.

OFFERS IN EVIDENCE

The plaintiff offers in evidence, in connection with the stipulation of the parties, this day filed, and as explaining the property described therein, the map entitled "COMPOSITE OF CORPS OF ENGINEERS REAL ESTATE SEGMENT MAPS (ABOVE AARONS CREEK)." May I have that marked as an exhibit.

(The map was received in evidence as Government Exhibit 2.)

Mr. Ferrell: I thought that was part of the stipulation and the Judge has it right on his desk.

Mr. Miller: This map is referred to in the stipulation and described, but it was not an exhibit to the stipulation. It was just stipulated that either party or both parties could offer it.

Mr. Ferrell: All right, we have no objection.

Mr. Miller: I might state further that I am putting this in evidence so Your Honor can keep that map for your personal use, if you should desire it.

May it please Your Honor, on the question of navigability of the Dan River, the plaintiff offers in—the plaintiff calls to the judicial notice of the Court, as a matter of record, the Acts of Congress and the Acts of the General Assembly of the Commonwealth of Virginia, as cited and set out on page 2 and 3 of the motion for pretrial conference by the plaintiff heretofore filed in this case. May it be stipulated with [fol. 59] respect to the Acts of the General Assembly of the Commonwealth of Virginia that the official printed and published records of the laws of Virginia, or the Acts of the General Assembly of Virginia, may be treated as in evidence in and before the Court as therein cited?

Mr. Ferrell: We will agree. I thought we had agreed to that.

Mr. Miller. That has been agreed, but it hasn't been so stipulated in the record.

Mr. Ferrell: We will so stipulate.

Mr. Miller: In that connection, the plaintiff also calls to the judicial notice of the Court the history of the navigation of the Roanoke and the Dan River as set out in *Power Co. v. Navigation Co.*, in 152 N. C., at page 472. This rather supplements the history in Virginia.

Mr. Ferrell: Have we received that before?

Mr. Miller: I gave you the citation before. I gave it down there when we were stipulating in your office in Richmond. I can give you the North Carolina case at any time.

Mr. Ferrell: I just do not recall.

Mr. Miller: Plaintiff now asks that Exhibit A to its motion for pretrial conference, as described on pages 3 and 4 of the motion for pretrial conference heretofore filed, be considered as in evidence and ask that it be stipulated—the first document in that Exhibit A, being a report of the Division Engineers, South Atlantic Division, to the Chief of Engineers, on the navigability of the Roanoke-Staunton-Dan River system above Weldon, North Carolina,—that it be stipulated that that can be treated as though duly certified as a certified—duly certified photostatic copy.

Mr. Ferrell: We will agree.

Mr. Miller: And the parts of that exhibit consisting of certain pages from the 8th, 11th, 28th, 34th, and 38th Annual [fol. 60] Reports of the Board of Public Works of the State of Virginia, to the General Assembly of Virginia, be considered as being duly certified by the State Corporation Commission.

Mr. Ferrell: We will so agree.

Mr. Miller: That is so stipulated.

May that also be stipulated with respect to the last pages in this Exhibit A, consisting of certain pages from the 38th Annual Report—no, will you strike that—consisting of certain pages of the Annual Report of the Internal Improvement Companies, of the State of Virginia, to the Board of Public Works, for the year 1876? May that be so stipulated?

Mr. Ferrell: Yes, sir.

Mr. Miller: In further connection on this same line, and it was not called to the attention of the Court at the pretrial conference, plaintiff calls to the judicial notice of the Court, and offers in evidence in connection with Exhibit A to the pretrial conference and as supplementary thereof, a photostatic copy of Senate Executive Document No. 98, 46th Congress, Second Session. Copy of this was furnished you. This is the copy that I mailed to you, and may that be marked as an exhibit, introduced as Government exhibit and marked?

(The document was received in evidence as Government Exhibit 3.)

Mr. Miller: May it please Your Honor, on the question of power value or the value of these easements for power purposes, I offer in evidence, as an admission against interest, but it may be used for other purposes, and also for the purpose of explaining why the rights of the Virginia Power Company here involved have no market value as of October 1952, the 1952 Annual Report of the Virginia Electric and Power Company to its stockholders.

[fol. 61] Mr. Ferrell: We object to that, Your Honor, as being irrelevant and immaterial.

The Court: It may go in.

Mr. Ferrell: Exception.

The Court: I think it has been made very clear, since the inception of this case, certainly for some months after,

that the Court expected and intended the valuation to be made without regard to any potential value as a power site, but solely on the basis of the fair market value of the land as it stood for any purpose for which it was now available and useable, either as farming, pasture land, wood land, or whatever it might be.

(The 1952 VEPCo Report was received in evidence as Government Exhibit 4.)

Mr. Miller: Now, may it please Your Honor, with respect to Your Honor's ruling as to the admissibility of the fee simple value of this 1500 acres in tract FF-3109E, I would like to make an offer of proof which will go on the exclusion record, because I know Your Honor has ruled against me on this, but I would like to make an offer of proof as to the elevations to which this dam will flood—is designed and constructed and capable of flooding. It will take a very brief time. Your Honor will rule it out and I know Your Honor's ruling, but I would like to make that offer of proof for the sake of the record.

The Court: All right, sir.

Mr. Miller: Plaintiff offers to prove that the John Kerr Dam, formerly Buggs Island Dam, as now constructed, is designed and constructed and susceptible of flooding, permanently, only to elevation 300 feet mean sea level. That as the dam is now constructed and designed and completed, it is capable of flooding only to contour 320 feet mean sea level.

Plaintiff also offers to prove the frequence of the [fol. 62] flooding between those two elevations, that is, 300 feet and 320 feet mean sea level.

Plaintiff further offers to prove that the only effect on land above elevation 320 feet, and up to contour 330 feet, will be during certain floodings by reason of backwater to increase the elevation of the natural floodings during periods of flooding.

As I understood Your Honor, that offer of proof would be rejected?

The Court: Yes, sir. As long as you contend that the Virginia Electric and Power Company has no rights there at all, I do not see that it makes any difference about how high or how often you would flood it. It would certainly seem to be immaterial, in view of your other contentions.

But, aside from that, I do not think it is proper evidence. The Company has flowage rights to 321 feet, and the Government is coming along and going farther than that and going to 330 feet. So, they have taken everything that the Virginia Electric and Power Company had. The question of What is the value of what they had?

Mr. Miller: May it please Your Honor, in the light of Your Honor's ruling, I would like to ask the Court and opposing counsel—I had two hydraulic experts here, or rather a hydraulic expert and a steam plant expert, who, in view of the development in this case just before lunch, make a plane reservation for 3:30, I believe, to go home. I would like to ask counsel if they have any idea of putting on any rebuttal evidence that might make it necessary for me to hold these witnesses here?

Mr. Ferrell: No, sir.

Mr. Lowden: The Judge excluded it.

[fol. 63] Mr. Ferrell: The Judge excluded it and we would object to their testifying.

. . . . . .

RENEWAL OF MOTION OF UNITED STATES TO STRIKE EVIDENCE AND DENIAL THEREOF

Mr. Miller: May it please Your Honor, I would like, as a matter of form, of course, to renew the Government's motion to strike all of the defendant Virginia Electric and Power Company's evidence except the evidence of value as to Tract JJ-3537A, for the reasons heretofore stated.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: The motion is denied.

Mr. Miller, I should like to inquire as to your purpose in introducing these documents which relate to, or seek to establish, the Dan River as a navigable stream. Is it your theory that the Power Company could not acquire any flowage right from a dam erected in a navigable stream?

Mr. Miller: Yes. May it please Your Honor, my theory, to be exact, is this on that. That the Dan River being navigable, and I think as a matter of common knowledge, this taking being under chiefly for flood control, I think

there is some purpose in navigation. The '44 Flood Control Act so recites. The Power Company's rights, with the exception, now,—of course, I am not talking about Tract JJ-3537A——

The Court: I understand that.

Mr. Miller: You have all of their rights in these other tracts, consisting only of easements, rights, or privileges, the right to dam and the right to flood, the right to build power houses in connection therewith, and other rights, all pertinent to damming privileges. They have value only [fol. 64] in connection with the flow and fall of the Dan River. It is a common accepted principle, and common knowledge, that power rights, such as they reserve, the extent of those rights, materially depend upon the flow of the stream, cubic feet per second, and water pressure of a head of water which can be developed only by putting a dam in the river.

Now, the authorities, if Your Honor is interested—the authorities on that position were cited on the third page, paragraph two, of the points and authorities I filed in connection with my motion for pretrial conference. I think the principle is probably stated better by the courts than I could state it. I am not proposing to argue a principle of law, but I am quoting from the *Continental Land Company* case, cited at page 4 of the points and authorities filed in court. The Court said:

[Reading]

> The riparian owner has no property right to the use of the water or the power inherent therein or the fall in flow of the water for commercial or any purpose as against the United States.

While it is just a West Virginia decision, I think the West Virginia court, district judge of the West Virginia court, summarized the principle as applicable to VEPCo's outstanding easements as successfully as any court has done so to date, where the court said, in 56 F. Supp., at page 303:

> The only possible value of the easements owned by it, ["it" referring to a power company] in these lands is their value for water power purposes. In view of

my conclusions announced above, there can be no such value as against the United States.

Of course, that principle is applicable only so far as it has been extended to a navigable river, and in this instance we are dealing with an interstate navigable [fol. 65] river and as against the United States in a proceeding where the property is being taken under the commerce clause. That is as far as we go in this case.

The Court: Gentlemen, when did the Virginia Electric Power Company acquire or succeed to the rights of these other companies?

Mr. Ferrell: Upon the merger between Virginia Public Service and Virginia Electric and Power Company.

The Court: When was that?

Mr. Ferrell: 1944. We do not want to burden the Court with an argument on this legal point because we take the view that he has just misunderstood entirely. We are not claiming any right in the flowage of the stream at all.

We have a memorandum here that we would like to file with the Court and rest.

The Court: I think Mr. Miller's view, as I interpret it, is this, that the Dan River, being a navigable stream, no private power company has a right to obstruct or build a dam there except under license from the Federal Power Commission, and if they undertook to acquire rights of that sort, they have no validity. Therefore, they can attribute no value to them here.

But the fact remains, as I see it, that for years—this thing of the assertion of the navigability of all of these streams all over the country has been a matter of rather recent development, and for years dams were built across that river and in the river without any permission from the War Department or any governmental permission at all. I assume that the persons who originally acquired these flowage rights did so of course in good faith, and they paid money for them. I wish I knew how much they had paid, but it appears that it cannot me analyzed to determine. But the Government comes along, Mr. Miller, and under [fol. 66] takes now to overflow 1850 acres of land in which the Virginia Electric and Power Company already had flowage rights in 1540, as I understand.

The present owner of that land, Mrs. Williams, I believe, has proceeded on the theory that she had no interest in the 1540 acres because she has already conveyed—because the Virginia Electric and Power Company already has flowage rights over it and she is granting you an option to flood to the 330 foot contour for the sum of $1.00, if I am correct in that.

Mr. Ferrell: Yes, sir.

The Court: Your position is that inasmuch as Virginia Electric and Power Company, according to your contention, has no rights upon which a value can be placed that you get the whole right to overflow 1840 acres of land for $1.00 without paying anybody for it.

I cannot accept that viewpoint. Whether or not the Virginia Electric and Power Company built a dam there and exercised its flowage rights without license from the Federal Power Commission is a question. It possibly couldn't have. But the fact is that they had purchased or acquired a valuable right there, something in which they had invested money. I cannot accept the viewpoint that it has no value at all and that the Government should be allowed, therefore, to get the flowage rights over this entire tract of 1840 acres for $1.00 which they paid to this Mrs. Williams and which she accepted because she thought that she or her predecessor had disposed of her flowage over all of the 1840 acres.

That seems to me to be the situation. I do not see any use in prolonging the entry of judgments in these cases. You have left me a right difficult proposition here, so far as the valuation of that land is concerned, because I am compelled to accept, so far as the larger [fol. 67] tract is concerned, the 1540 acres, the valuations of these Power Company appraisers. No dispute about it, there is no evidence. The Government is content to rest on its legal propositions and not dispute the valuations of the land, and I am compelled to accept them. I accept them with a little hesitancy because I think they were very considerably exaggerated when they came to talk about that 335 acres of land. And I am a little fearful that there may be some exaggeration of values as to the 1540. But I do not see that I can do anything else.

Mr. Miller: I do not like to interrupt Your Honor in the ruling, and I agree we might as well have a ruling. I

would like to make some explanation of our position in that matter. I would like to have the Court understand that personally, as much as anything else.

Of course now, this particular point, I am using the fee simple value. That has been thoroughly argued before Your Honor and the objections preserved, but it was some time ago and I would like to refresh Your Honor's recollection.

We are thoroughly convinced that under the doctrine of the *Boston Chamber of Commerce* case, as explained in brief by Judge Soper in the *Mayor, etc. of Baltimore*, 144 F. 2d 786, and many other cases heretofore cited, some dealing in the appraisal principle of flowage easements, that the fee simple value, or the value, we will put it, for farming purposes of the Vaughan land has no relationship whatsoever to the value of VEPCo's water and power rights. That is what it boils down to.

Mr. Ferrell: We are not claiming water power rights.

Mr. Miller: That situation is not unusual. That situation is not unusual, as pointed out by Judge Soper. Of course the case was not factual in point, but I think the principles are most amazingly accurately briefed by [fol. 68] Judge Soper in 147 F. 2d where Judge Soper said, at 789: [Reading]

> The sum of those values [that is, the value of a fee encumbered with an easement, and the value of the easement itself] may at times approximate the value of the unencumbered fee. It may be much less. Indeed the sum of these values may be only nominal.

Almost as reluctant as Your Honor.

The Government was compelled to come to the position in this case that this was one of those peculiar cases where the sum of those matters—the value of this Vaughan land for farming and the value of the power rights—were only nominal.

We searched and had the matter looked into carefully. I think we spent more money on going into that than we were justified. We could find no basis of value for these power rights——

The Court: Why didn't you offer this Mrs. Williams a fair amount of money for the fee in her land, then, if these

power rights had no value? She was the owner of a fee in 1840 acres of land, and you all tried to get it for $1.00 from her. I do not think the Government acted in good faith in that.

Mr. Miller: May I come to that, Your Honor?

That option, whatever reasons for, they started to go into her reasons for this. I objected. I don't think they are material. But the evidence, Government Exhibit 1 here, shows that she tendered an option to the Government for this land for $1.00. As a matter of fact, the reasons for that were, as you said, and also this was an area in which she was taking the fee simple——

Mr. Ferrell: Just a moment, now. I do not want to interrupt what you are going to say, but we have all of the facts in regard to that and you objected to it. And if you [fol. 69] are going to make any statement about it, we are going to call for the record, the correspondence between the people who negotiated.

Mr. Miller: All right to avoid further evidence I will make no further statement, except this. Evidence in court is an option from Mrs. Easley[2] for $1.00, and accepted by the Government.

Now, I considered this and looked into it. We would have contended, if this tract had been involved at all—we have contended the proper method of evaluating this property—the reason I am offering no rebuttal evidence on this—this is—we would have been—it would have been my position that the proper measure of value for this Easley[2] Estate land, with the easement imposed over it, would be the difference in value of that entire 7400 acres immediately befor the easement was imposed over it and the valve of the remaining part of the land immediately after the easement had been imposed over it, including all of the benefits and all of the—as well as all of the detriments of the effect of that flowage easement.

In the first place, I would have merely been able to have made that offer. Your Honor would have excluded it. And I think that such an appraisal would have cost—well, I know such an appraisal would have cost a very substantial

[2] Trial counsel inadvertently used the names Mrs. Easley, instead of Mrs. Williams, and Easley Estate, instead of Falkland Estate.

sum of money, due to the option that Mrs. Easley signed. And I think it is in evidence that she signed it represented by important counsel, and able and capable counsel. Due to that option she signed, that point was not involved in the case. And if I had prepared that appraisal on the basis that we would have used it Your Honor would have rejected it. That is the reason we did not have evidence offered along that line, and I did want Your Honor to understand it.

[fol. 70] The Court: But I have no idea that this Mrs. Williams signed an option for $1.00 for this property without it being represented to her and urged on her by representatives of the Government that she had already disposed of flowage rights in 1540 acres of it. I am sure that she was not acquainted with the Government's present position when she signed that option.

I say, I do not see any need to prolong this. I must accept the valuation, I think, of the witnesses for the Virginia Electric and Power Company as to the valuation of this FF-3100E, and I am going to accept the lowest figure that they place there, which is $40.00 an acre. You gentlemen can figure that up and take judgment for that amount.

As to the other, I am not at all satisfied that property is worth $1,000.00, that little 3.35 acres setting down there by the river with no access to it. That is the thing that destroys its value very largely, because without it is acquired by some person who had the power of eminent domain and could condemn a right of way into it, you might never have any access to it except by coming up the river. I expect $100.00 an acre would probably be a fair value for that, and you may take judgment for that amount. $335.00.

That is the best I can do, gentlemen, with the evidence before me. I should like to have heard other evidence as to the value of this larger tract, the nature of it but in the absence of any other evidence, I have to act solely on that which is before me.

Mr. Ferrell: Do you feel like you have sufficient evidence on the pleadings to determine what amount, if any, on this Pittard tract?

The Court: I do not know how much you own there, but I do not think you own over a hundred dollars of it.

Mr. Ferrell: Shall we prepare an order for that amount?

[fol. 71] The Court: Yes, sir.

Mr. Miller: May it please Your Honor, of course—and with all due respect to this Court, and this Court has my highest respect and I know we have differences of opinion, but this case was prepared for appeal and will be appealed, and I think would have been appealed however Your Honor had decided it. And I believe, as I recall the rules, the rules do not required [sic], if I remember the rule, under these trials before the judge, the rules do not require counsel to request it but they require the court to find the facts and the conclusions of law. I think the rule requires that.

Of course we wouldn't want to take this case up and have it sent back on a technicality to have the court find the facts separate and the conclusions of law, and I think that is a requirement. I was wondering now, as a matter of convenience for—I think it is going to be a very simple matter to find the facts in this case—if you would like to have counsel prepare the findings and conclusions?

The Court: I do not think there is any need for any elaborate findings of fact. My position has been made clear in this case for some time as to what I thought the rights were of the owner of this easement in respect to the value of these flowage rights. All that I have to find is a fact about the value of this land.

It might be very well to prepare very brief findings, but I do not see any need for anything elaborate. You just have one legal question in the case, or two, perhaps. This question you raise in regard to the stream, the nature of the stream being a navigable stream, and any benefits that you might get from that contention; and the other is whether or not this 1540 acres is to be valued on the basis representing its fee value in view of the extent of those flowage rights. Those are the only questions you have in the case.

[fol. 72] $61,000, or whatever dollars it is; is worth appealing from and I expected that, and I expected an appeal either way. But I do not feel like there is any need for anything elaborate in the findings of fact.

Mr. Ferrell: We would be pleased to prepare an order for Your Honor's consideration.

The Court: All right, if you will do that.

Mr. Miller: I think what Your Honor would want prepared is a final judgment for Your Honor's signature and submitted by counsel. And we can at least agree on the

form and substance so that all Your Honor will have to do is sign. I do not believe it will be so much trouble.

The Court: All right, sir, order entering judgment in those amounts.

The order in regard to the Pittard tract will provide for the distribution of funds as between your client and the other owners.

Mr. Ferrell: Yes, sir.

(Whereupon, the trial was concluded at 3:40 p.m., January 18, 1954.)

GOVERNMENT EXHIBIT 1

(Option contract for the purchase of flowage easement entered into between the fee owners of Tract FF-3100E and the United States. Received in evidence at page 19 of the transcript of the trial proceedings)

Project—Buggs Island Reservoir [now John H. Kerr Dam and Reservoir]. Tract—FF-3100E, Parcels A, B, C, D, E, F. Contract No.—DA-44-110-eng-1263. Vendor—Olive Vaughan Williams.

[fol. 73] OPTION FOR PURCHASE OF FLOWAGE EASEMENT

In consideration of One Dollar ($1.00) and other valuable considerations, the receipt and sufficiency of which are hereby acknowledged, the undersigned, hereinafter called the "Vendor", who represents that she is the owner of the property hereinafter described, hereby, for herself and her heirs, executors, administrators, successors, and assigns, agrees to convey to the United States of America, in accordance with the terms and conditions set forth below, the full, complete, and perpetual right, power and privilege to overflow as may be necessary as a result of the construction, maintenance, and operation of the Buggs Island Dam and Reservoir [now John H. Kerr Dam and Reservoir], together with the right, power and privilege to go upon the lands involved from time to time as occasion may require to accomplish any activities in connection with the maintenance and operation of the Buggs Island Dam and Reservoir [now John H. Kerr Dam and Reservoir], with free access thereto and unrestricted rights of ingress and egress to and from said lands, and to remove or cause to be re-

moved therefrom natural or artificial structures or obstructions which, in the opinion of the representative of the United States in charge, may be detrimental to the maintenance and operation of said project, without any liability to pay compensation to the Vendor, her heirs, or assigns, for said structures or for damages resulting from said removal, in, upon, under, over and across the following described premises, to-wit.

Parcel A: All that certain tract or parcel of land lying and situate in Roanoke Magisterial District, Halifax County, Virginia, bounded and described as follows: Beginning at a point in the center of Bannister River, at a [fol. 74] common corner with lands of Paul C. Edmunds on the north; thence, with the lands of Paul C. Edmunds north 40° 10′ east 2341 feet; thence, with the lands of W. J. Smith south 02° 40′ east 320 feet, south 05° 05′ west 445 feet and north 75° 00′ east 659 feet to an iron pin on a contour line having an elevation of 330 feet above mean sea level as determined from the Sea level Datum of 1929 through the medium of the Southeastern Supplementary Adjustment of 1936 by the United States Coast and Geodetic Survey; thence, a new line of division with the lands of Hannah N. Vaughan generally southwesterly, northeasterly, and northerly along the said 330 foot contour line as it meanders approximately 22,500 feet to an iron pin on Mrs. R. A. Smith line; thence, with the lands of Mrs. R. A. Smith South 62° 35′ east 50 feet and north 73° 35′ east 158 feet to the center of Peters Creek; thence, generally northerly and upstream along the center line of Peters Creek as it meanders approximately 715 feet to the center of Virginia State Road No. 716 being a common corner with lands of B. J. Smith and Katherine Smith and the lands of Paul C. Edmunds; thence, off the creek with the lands of Paul C. Edmunds northeasterly along the center line of Virginia State Road No. 716 as it meanders approximately 350 feet to a point on the aforesaid 330 foot contour line, thence, again a new line of division with the lands of Hannah N. Vaughan very generally southerly, easterly then northeasterly along the said 330 foot contour line as it meanders approximately 33,000 feet to an iron pin on Paul C. Edmunds line; thence, with the lands of Paul C. Edmunds north 87° 40′ east 1096 feet and north 15° 35′ east 250 feet to an iron pin on the aforesaid 330 contour

line; thence, again a new line of division with the lands of Hannah N. Vaughan very generally southeasterly along the said 330 foot contour line as it meanders approximately [fol. 75] 68,000 feet to an iron pin on Paul C. Edmunds line; thence, with the lands of Paul C. Edmunds south 05° 40′ west 236 feet and south 08° 15′ east 1248 feet to the low water line along the northeast bank of the Dan River; thence, northwesterly and upstream along the low water line of the northeast bank of the Dan River as it meanders approximately 26,800 feet to the mouth of the Bannister River; thence, northwesterly then northerly and upstream along the center line of the Bannister River as it meanders approximately 7,720 feet to the point of beginning, containing 1762.8 acres, more or less, and

Being a part of the land conveyed to Hannah N. Vaughan by the following deeds: Deed from Falkland Estate, Inc., dated October 26, 1926, and recorded in the Office of the Clerk of the Circuit Court of Halifax County, Virginia, in Deed Book 139, page 564; deed from Jesse Hill and Elanor Hill, his wife, dated May 26, 1940, and recorded in said Clerk's Office in Deed Book 161, page 218; and deed from Selina J. Boxley and John Boxley, her husband, dated March 12, 1941 and recorded in said Clerk's Office in Deed Book 162 page 539.

Parcel B: All that certain tract or parcel of land lying and situate in Red Bank Magisterial District, Halifax County, Virginia, the same being an island in the Dan River known as Pollards Island, the eastern end of said island is located opposite the mouth of Hyco River and the same lies south of and opposite the lands of the said Hannah N. Vaughan known as the Falkland Estate and contains 44.4 acres, more or less, and

Being a part of the land conveyed to Hannah N. Vaughan by a deed from Falkland Estate, Inc., dated October 26, 1926, and recorded in the Office of the Clerk of the Circuit [fol. 76] Court of Halifax County, Virginia, in Deed Book 139, page 564.

Parcel C. All that certain tract or parcel of land lying and situate in Red Bank Magisterial District, Halifax County, Virginia, the same being an Island in the Dan River immediately northwest of Pollards Island and south of and opposite the lands of the said Hannah N. Vaughan

known as the Falkland Estate and contains 21.2 acres, more or less, and

Being, a part of the land conveyed to Hannah N. Vaughan by a deed from Falkland Estate, Inc., dated October 26, 1926, and recorded in the Office of the Clerk of the Circuit Court of Halifax County, Virginia, in Deed Book 139, page 564.

Parcel D: All that certain tract or parcel of land lying and situate in Red Bank Magisterial District, Halifax County, Virginia, the same being an island in the Dan River immediately north of Pollards Island and south of and opposite the lands of the said Hannah N. Vaughan known as the Falkland Estate and contains 7.2 acres, more or less, and

Being a part of the land conveyed to Hannah N. Vaughan by a deed from Falkland Estate, Inc., dated October 26, 1926, and recorded in the Office of the Clerk of the Circuit Court of Halifax County, Virginia, in Deed Book 139, page 564.

Parcel E: All that certain tract or parcel of land lying and situate in Roanoke Magisterial District, Halifax County, Virginia, bounded and described as follows: Beginning at a point on the line dividing lands of Hannah N. Vaughan on the west and land of Annie B. Edmunds on the east, said point is south 05° 25' east 990 feet, measured along said dividing line from the northwest corner of the [fol. 77] said lands of Annie B. Edmunds; said point of beginning is further identified as located on a contour line having an elevation of 330 feet above mean sea level as determined from the Sea-level Datum of 1929 through the medium of the Southeastern Supplementary Adjustment of 1936 by the United States Coast and Geodetic Survey and is the northeast corner hereof; thence, with the lands of Annie B. Edmunds south 12° 36' 06" west 619.60 feet to a point on the aforesaid 330 foot contour line thence, a new line of division with the lands of Hannah N. Vaughan generally northwesterly then easterly along the said 330 foot contour line as it meanders approximately 1730 feet to the point of beginning, containing 3.6 acres, more or less, and

Being a part of the land conveyed to Hannah N. Vaughan by a deed from Selina J. Boxley and John Boxley, her hus-

band dated March 12, 1941, and recorded in the Office of the Clerk of the Circuit Court of Halifax County, Virginia, in Deed Book 162, page 539.

Parcel F: All that certain tract or parcel of land lying and situate in Roanoke Magisterial District, Halifax County, Virginia, bounded and described as follows: Beginning at a point on the line dividing the lands of Hannah N. Vaughan on the west and the lands of Annie B. Edmunds on the east, said point of beginning is south 05° 25′ each 990 feet, south 12° 36′ 06″ west 619.60 feet, south 02° 42′ 06″ west 718.57 feet and south 21° 00′ 10″ west 83.93 feet measured along said dividing line from the northwest corner of the said lands of Annie B. Edmunds, the said point of beginning is further identified as located on a contour line having an elevation of 330 feet above mean sea level as determined from the Sea-level Datum of 1929 through the medium of the Southeastern Supplementary Adjustment of 1936 by the United States Coast and Geodetic Survey [fol. 78] and is the northeast corner hereof; thence, with the lands of Annie B. Edmunds south 27° 31′ 44″ west 92.40 feet to a point on the aforesaid 330 foot contour line; thence, a new line of division with the lands of Hannah N. Vaughan northwesterly then easterly along the said 330 foot contour line as it meanders approximately 780 feet to the point of beginning and containing 0.8 of an acre, more or less, and

Being a part of the land conveyed to Hannah N. Vaughan by a deed from Selina J. Boxley and John Boxley, her husband, dated March 12, 1941, and recorded in the Office of the Clerk of the Circuit Court of Halifax County, Virginia, in Deed Book 162, page 539.

Together with the right, power and privilege to overflow, as above set forth, all the right, title and interest of the undersigned, in and to any public roads, highways, streets, alleys, and/or rights of way, strips or gores, lying within, or abutting upon the land above described from time to time as occasion may require.

The Vendor for herself, her heirs, executors, administrators and assigns, hereby covenants with the United States of America and its assigns, that neither the Vendor nor her heirs or assigns will ever erect any building or other structure or structures upon the said land without

first receiving the written consent of the Officer or Representative of the United States of America in charge of the maintenance and operation of the said Project, to do so.

Reserving, however, to the Vendor and her assigns all such rights and privileges as may be used and enjoyed without interfering with or abridging the estate, rights and interests to be conveyed to the United States in the above described premises.

Subject only to the following rights outstanding in third persons, namely:

[fol. 79] Subject to such water, flowage, riparian and other rights, if any, which the Virginia Electric and Power Company has in or on the above described lands. For a more particular description of said rights reference is herein made to a deed from Falkland Estate, Incorporated, to Hannah N. Vaughan, dated October 26, 1926, and recorded in the Office of the Clerk of the Circuit Court of Halifax County, Virginia, in Deed Book 139, at page 564, a deed from Hannah N. Vaughan to Middle Virginia Power Company, dated January 3, 1942, and recorded in said Clerk's Office in Deed Book 164, at page 84, a deed from Middle Virginia Power Company to Virginia Public Service Company, dated June 8, 1942, and recorded in said Clerk's Office in Deed Book 164, at page 557, and agreement of merger of Virginia Public Service Company with Virginia Electric and Power Company and order of transfer of property entered May 26, 1944, and on file in the Office of the Virginia State Corporation Commission at Richmond, Virginia.

The terms of this option are as follows:

(1) The purchase price of said estate, rights and interests in the said land is to be the sum of one dollar ($1.00) payable as soon as the United States has accepted this option and has had a reasonable time within which to secure and examine the evidence of title to said land and to obtain the necessary approval of title; provided that the Vendor can execute and deliver to the United States a good and sufficient general warranty deed conveying said estate, rights and interests in said land, with the hereditaments and appurtenances thereunto belonging to such estate, rights and in-

terests, to the United States of America, free from all liens [fol. 80] and encumbrances; said conveyance to be subject only to such outstanding easements or estates as may be set forth above; provided, however, that conveyances by states, municipal corporations, fiduciaries, and persons acting solely in a representative capacity need not contain general warranty covenants if otherwise acceptable and satisfactory to the United States.

(2) It is the intention of the Vendor and she hereby agrees that this option may be accepted by the United States through any duly authorized representative, by delivering, mailing or telegraphing a notice of acceptance to the Vendor at the address stated below, at any time within six (6) months from the date hereof.

(3) It is understood that the United States is to defray the expenses incident to the preparation of the deed to the United States and the abstract or certificate of title; provided, however, that the Vendor will deliver to the representatives of the United States any abstracts, certificates of title, or muniments of title available or in her possession.

(4) The Vendor agrees that all taxes, assessments, and encumbrances which are a lien against the land at the time of the conveyance to the United States shall be satisfied of record by the Vendor at or before the transfer of title to the aforesaid estate, rights and interests thereby conveyed; and, if the Vendor fails to do so, the United States may pay any taxes, assessments, and encumbrances which are a lien against the land; that the amount of such payments shall be deducted from the purchase price of the estate, rights and interests in the land thereby conveyed; at the request of the United States by its authorized representative and without prior payment or tender of the purchase price, she will execute and deliver the general warranty deed hereinabove provided for, conveying to the United States the said estate, rights and interests in and to the land herein de- [fol. 81] scribed; that she will pay the documentary revenue stamp tax and obtain and record such other evidence of title as may be required by the United States; it being understood that the Government will pay the fee for recordation of the deed to the United States.

(5) The Vendor agrees that loss or damage to the property by fire or acts of God shall be at the risk of the Vendor.

(6) The Vendor agrees that the United States may, at

its election, and notwithstanding the prior acceptance of this option, acquire title to the aforesaid estate, rights and interests in said land or any portion thereof, by condemnation or other judicial proceedings, in which event the Vendor agrees to cooperate with the United States in the prosecution of such proceedings and also agrees that the consideration hereinabove stated shall be the full amount of the award of just compensation inclusive of interest for the taking of said estate, rights and interests in said land and that said consideration shall also be in full satisfaction of any and all claims of the Vendor for the payment of the right of occupancy and use hereinafter provided for in Paragraph (7).

(7) As additional consideration for the payment of the purchase price hereinabove set forth, the Vendor hereby grants to the United States the right of immediate occupancy and use of the land hereinabove described for any purpose whatsoever not inconsistent with the estate, rights and interests hereby agreed to be conveyed from and after the acceptance by the United States of this option until such time as said estate, rights and interests in said lands are conveyed to the United States by the Vendor as hereinabove provided, and upon demand the Vendor will immediately vacate the property and deliver possession to the United States, in the event the continued occupation and possession [fol. 82] of said lands by the Vendor is considered by the contracting officer to be in conflict with the estate, rights and interests hereby agreed to be conveyed.

(8) In consideration of the premises, it is expressly understood and agreed that the above specified sum liquidates in full all damages and claims whatsoever that have occurred, or may hereafter occur, to the land above described or to the appurtenances thereunto belonging, by reason of the construction, maintenance, and operation of the Buggs Island Dam and Reservoir [now John H. Kerr Dam and Reservoir] and Vendor for herself, her heirs, executors, administrators, successors and assigns, agree to exonerate and release the United States of America and its assigns from any and all claims for damages done or caused to be done to the land above described or to the appurtenances thereunto belonging.

(9) It is agreed that the spouse, if any, of the Vendor by signing below agrees to join in any deed to the United States and to execute any instrument deemed necessary to convey

to the United States any separate or community estate or interest in the contracted estate, rights and interests in said property or to relinquish and release any dower, courtesy, homestead, or other rights or interest of such spouse in the estate, rights and interest hereby agreed to be conveyed.

(10) The above description of the real estate is subject to such modifications as may be necessary to conform to survey (if any) made by the agents of the United States, or to make any correction of minor errors discovered in said description.

(11) The Vendor represents and it is a condition of acceptance of this option, that no Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to or share any part of this option, or to any benefits that may [fol. 83] arise therefrom; but this provision shall not be constued to extend to any contract if made with a corporation for its general benefit.

(12) Wherever the context thereof requires, the singular number as used herein shall be read as plural, and the masculine gender as feminine or neuter.

(13) The Vendor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee; excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Vendor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

(14) All terms and conditions with respect to this option are expressly contained herein and the Vendor agrees that no representative or agent of the United States has made any representation or promise with respect to this option not expressly contained herein.

Signed, Sealed, and Delivered this 30 day of April, 1951.

Witnesses: (S) R. P. Buford.

(S) Olive Vaughan Williams, Vendor, (S) John R. Williams, Jr. (Seal).

[fol. 84] NOTICE OF EXERCISE OF OPTION IS TO BE SENT TO:

Olive Vaughan Williams, Halifax, Virginia.

21X3113 Flood Control, General 31 May 1951

Date:

The offer of the Vendor contained in this option is hereby accepted for and on behalf of the United States of America.

By Loney W. Hart, Contracting Officer, Corps of Engineers, Norfolk District.

Witness: (S) Robert E. Griffin.

IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS FILED JANUARY 18, 1954

STIPULATION

The Plaintiff, United States of America, and the Defendant, Virginia Electric and Power Company, for the purpose of simplifying the issues and the trial of this cause, hereby stipulate and agree as follows:

1. Subject to taxes for the year 1952, and deeds of trust to New York Trust Company, trustee, and Chase National Bank of the City of New York, trustee, Virginia Electric and Power Company owned in fee the tract of 3.35 acres of land lying on the south side of the Dan River and now described and platted in this proceeding as Tract No. JJ-3537A.

2. Under the Virginia Statutes relating to mills and other works on watercourses, Virginia Code, 1887, secs. 1347-60, Defendant's precedessors in title condemned a one-acre [fol. 85] tract on the north side of the Dan River for an abutment for a dam eight feet high above the usual water level, and this tract is now platted and described in this proceeding as Tract No. JJ-3537B. The order of allotment or condemnation of this tract appears in Order Book 11, page 425, Records of the Circuit Court of Halifax County,

under date of Saturday, July 29, 1899, a true copy of which has been filed in this proceeding and is attached to this stipulation, marked Exhibit 1.

3. As appears from the official tract map of the "JJ" segment of this proceeding, Tract JJ-3537B is on the north side of the Dan River directly opposite Tract JJ-3537A. Defendant Power Company's predecessors in title actually constructed a dam across the river between the two tracts between the years 1899 and 1905.

4. Thereafter, between the years 1903 and 1913, Defendant's precedessor in title, South Boston Electric Light and Power Company, acquired rights to flood certain lands located through the tracts herein platted in the "JJ" segment or series of this proceeding in connection with the dam eight feet in height, constructed across the Dan River, between Tracts JJ-3537A and B, by virtue of release deeds to it as follows: From Royal R. Scott, et al., by deed dated February 28, 1905; from Eliza M. Yates, et al., by deed dated August 4, 1906; from Elizabeth Gray, et al., by deed dated May 6, 1903; from Malcomb C. Bruce, et al., by deed dated July 26, 1907 and from Joseph Stebbins, Jr., Special Commissioner, et al. by deed dated December 24, 1913, all of which deeds have been heretofore more particularly described and agreed photostatic copies thereof filed in this cause.

5. Thereafter, said dam was destroyed by flood or otherwise became unfit for use about the year 1927 and has so remained until the date of the institution of this cause.

[fol. 86] 6. When said dam was completed, between the years 1899 and 1905, and for some years thereafter, it was used to supply electricity to the Town of South Boston. At the present time, the Town of South Boston and the surrounding area are supplied with electric power from the sources listed by the Defendant in answer to Plaintiff's interrogatories numbers 15 and 16.

7. There are 33.3 acres in Tract BB-2739, which are being acquired in fee in this proceeding and this is a part of a larger parcel of 56.9 acres, formerly owned successively by Olive Vaughan Williams, Hannah N. Vaughan and Falkland Estate, Inc. There are 1,840 acres in Tract FF-3100E over which a flowage easement is being imposed in this proceeding and this is a part of a larger single

parcel of land of 7,405.35 acres now owned by Olive Vaughan Williams and formerly owned by Hannah N. Vaughan and Falkland Estate, Inc., successively.

Plats of both of these tracts and the parcels of land out of which they come are filed herewith as Exhibits 2 and 3 to this stipulation.

In the deeds hereafter referred to, the entire tracts or parcels of land out of which Tracts BB-2739 and FF-3100E are taken were estimated to contain 6,199 acres, but the variance or increase in acreage is not material to this proceeding.

8. Defendant's predecessors in title acquired rights in and over the parcels of land of which Tracts Nos. FF-3100E and BB-2739 are a part, under deeds from Banister-Dam Mills Co., dated May 1, 1907, a true photostatic copy of which has been filed in this proceeding as Defendant's Exhibit E, and from J. J. Lawson, et al., dated May 1, 1907, Defendant's Exhibit F, both deeds being to South Boston Electric Light and Power Company and as reserved by that company in its deed to Falkland Estate, Inc., dated [fol. 87] January 19, 1920, Defendant's Exhibit G, all of which rights were as follows:

> Water rights, water power and water privileges, including the right to construct and maintain a dam or dams or other works on said lands and to raise the water at the head of Hyco Falls in the Dan River six feet above the usual water level without compensation for damages caused thereby.

9. Defendant's predecessors in title also acquired rights in the entire parcels of land of which Tracts Nos. FF-3100E and BB-2739 are a part, as described in the deed from Falkland Estate, Inc., of October 14, 1925, a true photostatic copy of which has been filed in this cause as Defendant's Exhibit C, as corrected by the deed from Hannah N. Vaughan of January 3, 1942, Defendant's Exhibit D.

10. The provision in the deed mentioned above, limiting "the normal water level behind said dam or dams" to be no higher than the extreme height to which Middle Virginia Power Company had the right to elevate the waters of the Dan River under the deed from Halifax Power Company, had reference to the right to dam and dams formerly existing

on the Dan River at a place known as Rogers Island, several miles upstream from the Town of South Boston and upstream from the "JJ" segment as platted in this proceeding. These rights were to maintain a dam from the north bank of the river to Rogers Island to elevate the water to a height of six and one-half feet above the usual water level and to maintain a dam from Rogers Island to the south bank of the Dan River to elevate said water to a height of eight feet above the usual water level.

11. The dams and the rights at Rogers Island are upstream from any lands involved in this proceeding; said dams have long since been out of existence and are not [fol. 88] material to this proceeding except to determine the height to which Defendant's predecessors had the right to dam or flood in connection with the lands involved in Tracts FF-3100E and BB-2739; said dams at Rogers Island are shown on a contour map filed herewith as Exhibit 4 to this stipulation.—It is agreed that the aforesaid dams raised the water level at Rogers Island to 321 ± m.s.l., and that if the Defendant had the right to dam and flood the lands involved in Tracts FF-3100E and BB-2739 to that height at Rogers Island, that it would flood 1540 ± acres of Tract FF-3100E and 20.5 acres of Tract BB-2739. It is further agreed, however, that raising the normal water level eight feet behind any dam built on or below Tracts FF-3100E and BB-2739 would bring the water level little, if any, above the natural river banks and would flood only a nominal amount of acreage of said Tracts FF-3100E and BB-2739.

12. All exhibits heretofore filed in the case to date may be used and introduced in evidence by either party without certification or formal proof, subject to such objections as would lie against the original of said documents.

13. A map entitled "Composite of Corps of Engineers Real Estate Segment Maps above Aarons Creek" may be introduced in evidence by either party.

This 18th day of January, 1954.

United States of America, By (S.) Murray A. Foster, Special Assistant to the United States Attorney. (S.) W. Braxton Miller, Attorney, Department of Justice. Virginia Electric and Power Company, By (S.) Ralph H. Ferrell, Jr.

[fol. 89] EXHIBIT 1 TO STIPULATION

(Order Book 11, Page 425, Circuit Court of Halifax County)

Saturday, July 29, 1899

— July Term 1899

In the matter of the application of Jos. Stebbins, J. J. Lawson, R. W. Lawson, R. S. Barbour, and J. A. Mebane to erect a dam across Dan River from their lands on the South side of said River to the lands of Alexandria Bruce on the North side of said River,

This cause came on this day to be heard on the report of W. D. Hill, J. M. Carrington and A. H. Vaughan, three of the Commissioners appointed at the present term of this Court, returned to the court on the 27th day of July, 1899, to which report no exception has been taken, and it appearing to the Court from an inspection of said report that if leave be granted to the applicants, the said Jos. Stebbins, J. J. Lawson, R. W. Lawson, R. S. Barbour and J. A. Mebane to erect the water mill, machine, manufactory of enging and dam as propsed by them, the mansion house of no person, nor the out-house, yard, garden or orchard belonging thereto will be taken or overflowed, that ordinary navigation will not be obstructed, that the obstruction to the passage of fish can be avoided by the construction of a fish ladder, that the health of the neighborhood will not be annoyed by the stagnation of the waters or otherwise, that none of the lands on the River above said dam will be overflowed injured or taken except the lands of the said Alexander Bruce, that not more than one acre of land has been circumscribed around the point upon which the dam will abut on the North side of the river which land is owned by the said Alexander Bruce, which said land is valued at [fol 90] ($50.00) Fifty Dollars by said Commissioners and it further appearing that the applicants do not ask to erect a dam more than eight feet high above the usual water level of said Dan River, the damages from which to the lands of said Alex. Bruce are assessed by said Commissioners at ($70.00) Seventy Dollars. It is ordered that said report to which there is no exception or objection be and the same is hereby confirmed; and leave is granted

to the applicants the said Jos. Stebbins, J. J. Lawson, R. W. Lawson, R. S. Barbour and J. A. Mebane to erect and operate a water mill and other machinery, manufactory or engine upon their lands in Halifax County on the South side of Dan River, and to erect a dam across said river from a point on the lands of the applicants on the South side of Dan River some 400 or 500 yards above the Iron Bridge of the Norfolk and Western Rail Road across said River to a point on the land of said Alexander Bruce, laid off and designated in the report of said Commissioners, but before erecting said dam, the said applicants shall pay to the said Alexander Bruce the sum of ($50.00) Fifty Dollars, the damages assessed for the land circumscribed and laid off for the abutment of said dam and the further sum of ($70.00) Seventy Dollars for the damage assessed for the injury of his land resulting from the erection of said dam.

In United States District Court

Judgment and Order for Final Distribution—Filed January 18, 1954, as corrected by order correcting clerical error filed January 27, 1954

This matter comes on for trial by the court of the issue of just compensation, by consent of the United States of America, plaintiff herein, by John Strickler, United States Attorney for the Western District of Virginia; Murray A. Foster, Special Assistant to the United States Attorney, and W. Braxton Miller, Attorney, Department of Justice, [fol. 91] and by consent of the Virginia Electric and Power Company, by Ralph H. Ferrell, Jr. Francis V. Lowden, Jr., and R. Hugh Rudd, Jr., its counsel; and

It appearing to the court from the Declaration of Taking, filed herein on October 23, 1952, the other papers filed herein on behalf of the aforesaid parties, including the stipulation dated January 18, 1954, and the evidence heard in open court on the 18th day of January, 1954, that the defendant Virginia Electric and Power Company on October 23, 1952, held a perpetual easement to flood permanently 1540 acres of the land described herein as Tract No. FF-3100E, parcels A to F, inclusive, and that just compensation for said flood-age easement as of the date of taking should be fixed at

Sixty-one Thousand Six Hundred Dollars ($61,600.00), exclusive of interest and;

It further appearing to the court that upon the filing of the aforesaid Declaration of Taking, the United States of America deposited the estimated compensation for the aforesaid rights of Virginia Electric and Power Company in and upon said Tract No. FF-3100E, the sum of One Dollar ($1.00); and upon the statement in open court of James S. Easley, counsel for Olive Vaughan Wililams, defendant herein, the she is asserting no claim to any of the compensation which might be awarded to Virginia Electric and Power Company for its aforesaid floodage rights in said Tract No. FF-3100E, other than the $1.00 deposited in the registry of the court in accordance with the stipulation between the said Olive Vaughan Williams and the United States of America, filed herein on July 31, 1953;

It is, therefore, ADJUDGED and ORDERED by the court that the just compensation to be paid by the plaintiff, the United States of America, for the taking of the full, complete, and perpetual right, power and privilege to overflow, permanently or intermittently, as may be necessary as a result of [fol. 92] the construction, maintenance, and operation of the John H. Kerr Dam and Reservoir, as described in the Declaration of Taking heretofore filed in this cause, shall be the sum of Sixty-one Thousand Six Hundred Dollars ($61,600.00,) exclusive of interest, and that said sum, with interest upon $61,599.00 thereof from October 23, 1952, until the date of payment, shall be deposited in the registry of this court by the plaintiff, the United States of America; and

It is further ORDERED that upon recipt of the aforesaid sum of $61,599.00, with interest thereon as aforesaid, the clerk of this court be, and he hereby is, authorized and directed to issue a check in the sum of Sixty-one Thousand Six Hundred Dollars ($61,600.00), together with all of the interest paid as aforesaid, payable to the order of Virginia Electric and Power Company, and to mail the said check to said payee, as follows:

Virginia Electric and Power Company
7th and Franklin Streets,
Richmond, Virginia.

The clerk shall mail a certified copy of this order to the bank in which said fund is on deposit, which shall be the authority for said bank to pay the said check when presented,

It is further Adjudged and Ordered that upon the payment and mailing of the aforesaid check that this judgment be, and it is hereby, satisfied.

It is further Ordered that the clerk of this court mail two certified copies of this order to Mr. Murray A. Foster, Special Assistant to the United States Attorney, P. O. Box 601, Lynchburg, Virginia, and three copies to Mr. Ralph H. Ferrell, Jr., care Hunton, Williams, Anderson, Gay and Moore, Electric Building, Richmond, Virginia.

(S.) John Paul, District Judge.

[fol. 93] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6839

UNITED STATES OF AMERICA, Appellant,

v.

2979.72 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF HALIFAX, VIRGINIA, OLIVE VAUGHAN WILLIAMS, ET AL., AND UNKNOWN OWNERS, Appellees

Appeal from the United States District Court for the Western District of Virginia, at Lynchburg

Argued October 13, 1954

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

Harold S. Harrison, Attorney Department of Justice (Perry W. Morton Assistant Attorney General, John Strickler, United States Attorney, John F. Cotter and S. Billingsley Hill, Attorneys, Department of Justice, on brief), for Appellant, and Francis V. Lowden, Jr., and Ralph H. Ferrell, Jr., (T. Justin Moore and Hunton, Williams, Gay, Moore & Powell on brief) for Appellee Virginia Electric and Power Company.

OPINION—Decided January 5, 1955

PARKER, Chief Judge:

This is another appeal in condemnation proceedings had in connection with the John H. Kerr Dam and Reservoir, a flood control project on the Roanoke River in Virginia and North Carolina. The Virginia Electric and Power Com-[fol. 94]pany held flowage easements over 1540 acres of land belonging to Mrs. Olive Vaughan Williams. The government filed a declaration of taking with respect to this land corresponding in all respects with the declaration of taking filed in the case of *United States* v. *2048.31 acres of land, more or less, in the Counties of Charlotte and Halifax,*

Virginia, J. P. Stevens & Co., et al., this day decided. Mrs. Williams had agreed to convey any interest she may have had in the land to the government for the nominal consideration of one dollar. The court held that the power company was entitled to recover from the government the fee simple value of the land, which was found to be $40 per acre, and on this basis entered judgment in favor of the power company and against the government for the sum of $61,600. The government has appealed from this judgment, contending (1) that there can be no recovery against the government for rights which would have value only in connection with the development of water power on a navigable stream, and (2) that, at all events, the government is liable, not for the fee simple value of the land, but for the difference between its value with and without the servitude resulting from the easement which the government is acquiring.

On the first question thus raised, we think that the position of the government is wrong for reasons fully set forth in our opinion in *United States* v. *Twin City Power Co.*, 4 Cir. 215 F. 2d 592, which need not be repeated here.

On the second question, this case differs from *United States* v. *2648.31 Acres of Land, etc., supra*, this day decided, in that what is being taken here is the flowage easement of the power company, which was to flood permanently the entire 1540 acres of land, leaving no use of any value in the owner of the fee. The trial Judge was justified, [fol. 95] therefore, in valuing the flowage rights of the power company over the 1540 acres which were destroyed by the government's taking as being measured by the fee simple value of the land which would be thus overflowed, since the value of flowage rights is the difference between the value of the land with and without the servitude imposed by the flowage easement. The fact that under the taking by the government there would be only an intermittent flooding of some portions of the 1540 acres is immaterial, since the flowage rights of the company were rendered worthless by the government's taking and their value must be the basis of the company's compensation. To state the matter simply, the power company is entitled to compensation for its flowage right easement which is

destroyed by the government's taking. That easement was to flood completely the 1540 acres of land. The evidence is that the land which without this servitude would have a value of $40 per acre would have no value at all with the servitude imposed. It was doubtless for this reason that the owner was willing to convey her interest in the fee to the government for the nominal consideration of one dollar.

Affirmed.

Supreme Court of the United States

PER CURIAM ORDER OF JANUARY 30, 1956

Excerpt from 350 U.S. 956:

No. 41. UNITED STATES *v.* VIRGINIA ELECTRIC & POWER CO. On petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit. *Per Curiam:* The petition for write of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeals for further consideration in the light of *United States v. Twin City Power Co.*, 350 U.S. 222. Solicitor *General Sobeliff* for the United States. *Ralph H. Ferrell, Jr.*, and *Francis V. Lowden, Jr.*, for respondent. Reported below: 218 F. 2d 524.

[fol. 96] In United States Court of Appeals for the Fourth Circuit

No. 6839

United States of America, Appellant

versus

2979.72 Acres of Land, More or Less, in the County of Halifax, Virginia, Olive Vaughan Williams, et al., and Unknown Owners, Appellees

Appeal from the United States District Court for the Western District of Virginia, at Lynchburg

(Argued June 13, 1956.)

Opinion on Remand from Supreme Court, July 31, 1956

Before Parker, Chief Judge, Soper, Circuit Judge, and Bryan, District Judge.

Harold S. Harrison, Attorney, Department of Justice (Perry W. Morton, Assistant Attorney General; John Strickler, United States Attorney; and Roger P. Marquis, Attorney, Department of Justice, on brief), for Appellant, and Ralph H. Ferrell, Jr. (T. Justin Moore, Francis V. Lowden, Jr., and Hunton, Williams, Gay, Moore & Powell, on brief), for Appellees.

Parker, Chief Judge:

This is the second hearing of an appeal by the United States in condemnation proceedings had in connection with the John H. Kerr Dam and Reservoir, a flood control project on the Roanoke River in Virginia and North Carolina. The Virginia Electric and Power Company was the owner of a flowage easement over 1540 acres of land belonging [fol. 97] to Mrs. Olive Vaughan Williams, and the value of this easement was destroyed by the taking of flowage rights by the United States in the condemnation proceeding. We affirmed the judgment below which awarded compensation on the basis that the right to flood permanently the entire

1540 acres had been taken. We based this affirmance on the ground that the value of the power company's flowage rights was destroyed by the taking, even though there would be only an intermittent flooding of the land as a result thereof. In this connection following our decision in *United States* v. *Twin City Power Company* 4 Cir. 215 F. 2d 592, we held against the government's contention that there could be no recovery against the government for rights which would have value only in connection with the development of water power on a navigable stream. See *United States* v. *2979.72 Acres of Land etc.* 4 Cir. 218 F. 2d 524. The Supreme Court granted certiorari, vacated our judgment and remanded the case to us for further consideration in the light of its decision in the *Twin City* case 350 U.S. 222, which reversed our decision in that case.

The holding of the Supreme Court in the Twin City case was that the availability of land on a navigable stream as a site for water power development could not be considered as an element of value in assessing damages on a taking by the government. Nothing in the opinion holds that compensation must not be made for other elements of value; and the case was expressly distinguished from *United States* v. *Kansas City Life Ins. Co.* 339 U.S. 798 where, as here, "assertion of the dominant servitude in the navigable river injured property beyond the bed of the stream." See 350 U.S. at 225. In taking the flowage easement over the 1540 acre tract here involved, therefore, the government must make compensation on the basis of the difference in the value of the land with and without the easement taken, [fol. 98] on the principle that "the destruction of privately owned land is 'a taking' to the extent of the destruction caused." *United States* v. *Kansas City Life Ins. Co.*, supra, 339 U.S. 799, 809-810. Availability as a site for water power development must be excluded from consideration in making this valuation; but other elements of value not related to the flow of the stream, such as its value for agricultural or grazing purposes, can properly be considered. The amount thus determined must be paid into court by the government as compensation for the taking and must be awarded by the court to those having an interest in the land in accordance with their interest. The condemnation suit is a proceeding in rem. The owners of the res are entitled to have the compensation divided among them according to their

interests in the res taken. See *Meadows* v. *United States*, 4 Cir. 144 F. 2d 751, 753 and cases cited; 18 Am. Jur. 872; *Cullen & Co.* v. *Bender Co.* 122 Ohio St. 82, 170 N.E. 633, 68 A.L.R. 1332; note 69 A.L.R. 1263. As said by this court in *Meadows* v. *United States*, supra:

> "The taking was not of the rights of designated persons in the property but of the property itself. '* * * an unqualified taking in fee by eminent domain takes all interests and as it takes the res is not called upon to specify the interests that happen to exist.' Duckett & Co. v. United States, 266 U.S. 149, 45 S. Ct. 38, 69 L.Ed. 216. The value of the property once being determined in a proper proceeding, the sum so determined stands in the place of the property and can be distributed upon the adjudication of the value of the respective interests. United States v. Dunnington, 146 U.S. 338, 13 S.Ct. 79, 36 L.Ed. 996; Monongahela Navigation Co. v. United States, 148 U.S. 312, 13 S. Ct. 622, 37 L.Ed. 463."

[fol. 99] It is argued that the government should not be required to pay anything to the power company, for the reason that the flowage rights that the power company has acquired are of value only for the purposes of water power development. The answer is that the conveyance of flowage rights by the owner of the land to the power company vested in the latter the interest in the land that is being taken by the government here in the condemnation proceeding and entitles it to compensation for the taking of such interest. See *United States* v. *Welsh* 217 U.S. 333. The proposition that because the government has obtained from the owner of the fee a conveyance for which it has paid only one dollar (evidently accepted because the remaining interest in the land had no value after the conveyance of the easement to the power company), it may acquire by condemnation the right to flood the land without paying anything to the owner of the flowage easement, has nothing to commend it either in logic or in common sense. If Mrs. Williams were the owner of the entire interest in the land, no one would contend that she would not be entitled to compensation for the condemnation of flowage rights by the government. Where

these flowage rights have been conveyed to another, there is no reason in law, in equity, in good conscience or in common honesty why the compensation to which she would otherwise have been entitled should not be paid to the one to whom such rights have been conveyed. The taking for which the government must make compensation here has damaged no one except the power company which had acquired the easement to flood the land; and, as owner of that easement, it is entitled to receive the compensation awarded for such taking.

The power company argues that since availability for water power development was not considered by the court below in making its valuation, its judgment should be af- [fol. 100] firmed. This, however, overlooks the fact that the court made its valuation on the basis of the entire tract being taken for the purpose of permanent flooding, whereas the easement taken by the government was to flood only such portions of the land permanently or intermittently as would be necessitated by the John H. Kerr dam and reservoir; and this would not destroy the entire value of the land for agriculture or grazing purposes. See *United States* v. *2648.31 Acres of Land etc.* 4 Cir. 218 F. 2d 518. An element of confusion is introduced because the power company acquired from the owner of the land the right to flood the entire tract permanently; but this is not the right which the government is taking. The conveyance by the owner to the power company is of significance only as transferring to the latter the right to the compensation awarded for the flowage rights condemned by the government.

For the reasons stated, the judgment appealed from will be vacated and the case will be remanded to the court below with directions to award to the power company as compensation for the taking of the easement condemned the difference between the value of the land with and without the servitude of the easement, excluding from the valuation in both instances any element of value arising from the availability of the land for water power purposes due to its being situate on a navigable stream.

Judgment Vacated and Case Remanded with Directions.

[fol. 100a] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6839

UNITED STATES OF AMERICA, Appellant,

v.

2979.72 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF HALIFAX, VIRGINIA, OLIVE VAUGHAN WILLIAMS, ET AL., AND UNKNOWN OWNERS, Appellees

Appeal from the United States District Court for the Western District of Virginia, at Lynchburg

ON PETITION FOR REHEARING

(Petition presented August 30, 1956. Decided September 11, 1956)

Before PARKER, Chief Judge, SOPER, Circuit Judge and BRYAN, District Judge.

HAROLD S. HARRISON, Attorney, Department of Justice, (Perry W. Morton, Assistant Attorney General; John Stickler, United States Attorney, and Roger P. Marquis, Attorney, Department of Justice, on brief) for Appellant, and Ralph H. Ferrell, Jr., (T. Justin Moore, Francis V. Lowden, Jr., and Hunton, Williams, Gay, Moore & Powell on brief) for Appellees.

PER CURIAM:

A petition for rehearing insists that since the flowage easement of the power company had no value to it except for water power purposes, and since value for such purposes cannot be considered, it is not entitled to any compensation whatever for the destruction of its easement as a [fol. 100b] result of the government's taking. The answer is that the taking by the government is a proceeding in rem. It must pay as compensation for the taking the amount by which the value of the land is decreased as a result of the taking of the flowage easement, and the owner whose inter-

est is damaged as a result of the taking of that easement is entitled to the compensation. There can be no question but that the power company here had acquired the interest in the land, i.e. the flowage rights, which the government is taking by condemnation, and that compensation for such taking should be made to the power company as the owner of that interest. And there can be no question, furthermore, but that the compensation to be paid is, not the value of that interest to the power company, but the difference in the value of the land with and without the flowage easement, not considering its value for water power purposes. The case is not one of paying compensation to the owner of the land for the imposition of an additional or second easement, but of allocating compensation between the owner of the fee and the owner of a flowage easement which is destroyed as a result of the taking.

Rehearing Denied.

[fol. 191] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, continued and held at Lynchburg in and for said District

Honorable JOHN PAUL, Chief District Judge.

No. 296 Civil

[Title omitted]

ORDER ON MANDATE—September 24, 1956

The plaintiff in the above-entitled action having appealed from the judgment entered therein by this Court on the 18th day of January, 1954, to the United States Court of Appeals for the Fourth Circuit, and said Court having, upon a hearing of said appeal in the term of June, 1956, vacated the aforesaid judgment of this Court, no costs being adjudged, and remanded said cause to this Court with direction to award to the Virginia Electric and Power Company as compensation for the taking of the easement condemned the difference between the value of the land with and without the servitude of the easement, excluding from the valuation in both instances any element of value arising from the availability of the land for water power purposes due

to its being situate on a navigable stream, in accordance with the opinion of the appellate Court filed herein, all of which more fully and at length appears from the opinion and mandate of said Court received: it is, therefore, accordingly

ORDERED

[fol. 102] that said opinion and mandate be filed; and that further appropriate proceedings herein be had to award to the Virginia Electric Power Company compensation in conformity to the provisions of the aforesaid judgment of said appellate Court.

And it is further ORDERED that this order be entered in the civil order book and copies hereof certified to counsel of record for the respective parties hereto.

ENTER:

(S.) John Paul, Chief District Judge.

[fol. 103] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT ROANOKE

Civil No. 296

Tract No. FF-3100E

[Title omitted]

MOTION FOR ORDER TO APPOINT COMMISSIONERS—APRIL 23, 1958

The United States of America, plaintiff, by Leigh B. Hanes, Jr., Assistant United States Attorney, having heretofore moved the Court for the trial of the issue of just compensation by jury, which Motion was denied and exception thereto duly noted; and

The Court having directed the parties herein to submit names of Commissioners suitable for the trial of the issue of just compensation; and

The partles having agreed upon suitable Commissioners for the trial subject to the foreging exception;

Now, Therefore, in consideration of the premises the plaintiff moves the Court for entry of an Order Appoint-

ing the Commissioners agreed upon, subject to the foregoing exception, and directing said Commissioners in the following terms ~~to make the following~~ inquiries on the issue of the compensation:

"Pursuant to said Rule 71A, the commission shall have the powers of a master provided in Rule 53 of the Federal Rules of Civil Procedure, including the power to regulate [fol. 104] the proceedings, rule on questions of evidence and to do all acts and take all measures necessary or proper for the efficient performance of its duties under this order.

"The action and report of the commission shall be determined by a majority thereof which shall ascertain and report, including specific findings as to matters on which its valuations are based and showing how it applied the applicable principles of law in reaching the ultimate conclusions on each of the following inquiries:

First: What rights does Virginia Electric Power Company have in, over, across etc., the Falkland Estate by reason of its easement deeds, excluding therefrom such rights or use as pertain to its use in connection with or development for water power purposes and/or arising by reason of its being situate on a navigable stream?

Second: What is the difference, prior to the Government acquisition, between the value of the Falkland Tract consisting of 7400 acres, as of October 23, 1952, with and without the servitude of the Virginia Electric Power Company's easement; excluding from both of such valuations any element of value arising from or in connection with possible use of such easement for water power purposes and/or arising by reason of its being situate on a navigable stream?

Third: What is the difference, prior to the Government's acquisition, between the value of Tract No. FF-3100E involving 1840 acres determined as of October 23, 1952, with and without the servitude of Virginia Electric Power Company's easement, excluding from both of such valuations any element of value arising [fol. 105] from or in connection with possible use of easement for water power purposes and/or arising by reason of its being situate on a navigable stream?

Fourth: What is the difference, prior to the Government's acquisition between the value of Tract FF-3100E up to the 321' MSL contour line consisting of 1540 acres determined as of October 23, 1952, with and without the servitude of Virginia Electric Power Company's easement, excluding from both of such valuations any element of value arising out of or by reason of the use of such property in connection with or the development of water power purposes and/or arising by reason of its being situate on a navigable stream?

Fifth: In the determination of each of the above inquiries the Commissioners shall take into consideration the effect, if any, on the lands involved, of the easement held by the Virginia Electric Power Company, excluding from such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream.

(S.) Leigh B. Haines, Jr., Assistant United States Attorney.

Dated April 23, 1958.

Address: Federal Building, Roanoke, Virginia.

[fol. 10C] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT ROANOKE

Civil No. 296

[Title omitted]

ORDER APPOINTING COMMISSIONERS—MAY 1, 1958

On Motion of the Defendant, Virginia Electric and Power Company, for the appointment of commissioners to determine the just compensation to be paid to said defendant for the acquisition by condemnation by the United States of America of an easement over the tract of land designated and described in this proceeding as Tract No. FF-3100E, a description of which tract is hereto attached marked Exhibit A,

It appearing to the Court that notice of condemnation has been duly served, as required by Rule 71A of the Rules

of Civil Procedure, upon all persons having or claiming any interest in said tract, and that the plaintiff has demanded a jury trial on the issue of just compensation, and

It further appearing to the Court

(1) That the lands in question are located approximately sixty miles from Danville, Virginia, the nearest city in which Federal Court sits:

(2) That upon the trial of this case the defendant intends to offer the oral testimony of residents of the area in which [fol. 107] these lands lie, and that it would be inconvenient, expensive and burdonsome for such witnesses to travel to Danville to give their testimony in this case;

(3) That it will not be feasible for the issues in this case to be determined by a jury because of the distance involved, with the difficulty and expense of transporting the jury from Danville to the lands in question, and return;

(4) That because of the character, location and quantity of the property and the unusual nature of the inquiries to be made herein, this proceeding can be materialy facilitated by reference to a commission;

(5) That the hearings can be considerably shortened by reference to a commission rather than a jury;

(6) That the issues of compensation can be better determined by a commission than by a jury in the circumstances presented by this case; and

It appearing and the Court now finding that due to the character and location of the property taken, and for the other reasons above recited, it is in the interest of justice that the issue of just compensation in this matter be tried by commissioners pursuant to said Rule 71A,

Now therefore, plaintiff's motion for trial by jury is hereby denied, to which ruling of the Court plaintiff excepts, and the Court hereby appoints Robert S. Weaver, Victoria, Virginia, J. T. Thompson, Keysville, Virginia, and James B. Wilborn, South Boston, Virginia, three disinterested freeholders, as commissioners, and with the consent of all counsel, the United States consenting without waiving its demand for trial by jury and its exception to the Court's denial of said demand, the Court hereby appoints Wirt Shapard, Halifax, Virginia, as alternate commis-

[fol. 108] sioner to serve in the event of inability of one of the regular commissioners to act.

Pursuant to said Rule 71A, the commission shall have the powers of a master provided in Rule 53 of the Federal Rules of Civil Procedure, including the power to regulate the proceedings, rule on questions of evidence and to do all acts and take all measures necessary or proper for the efficient performance of its duties under this order.

The duty of the Commissioners shall be to ascertain and report on each of the following inquiries:

First: What is the difference between the fair market value of the Falkland Tract, consisting of 7,400 acres, with and without the servitude of the Government's easement, as described in Exhibit B hereto attached, over the land in Tract FF-3100E up to contour 330, involving 1840 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?

Second: What is the difference between the fair market value of the Falkland Tract, consisting of 7400 acres, with and without the servitude of the Government's easement, as described in Exhibit B hereto attached, assuming for the purpose of this inquiry that said easement is over the land in Tract FF-3100E up to contour 321 only, involving 1540 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?

Third: What is the difference between the fair mar- [fol. 109] ket value of Tract FF-3100E, consisting of 1840 acres, assuming for the purposes of this inquiry that said tract of land stands alone, with and without the servitude of the Government's easement, as described in Exhibit B hereto attached, over said tract of land up to contour 330, involving 1840 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?

Fourth: What is the difference between the fair market value of Tract FF-3100E, consisting of 1840 acres, assuming for the purpose of this inquiry that said tract of land stands alone, with and without the servitude of the Government's easement as described in Exhibit B hereto attached, assuming further that said easement is over the land in Tract FF-3100E up to contour 321 only, involving 1540 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?

In making the First, Second and Fourth inquiries, the commissioners shall include only such damage, if any, to the residue which are over and above the benefits, if any, peculiar to the residue in each instance, resulting directly from the taking and proposed use to be made by the Government of the land taken herein.

It is further ordered that said commissioners met at 10:00 o'clock A.M. on the 2nd day of June, 1958, at the Halifax County Court House, in Halifax, Virginia, to be sworn and instructed as to their duties as such. The commissioners shall be sworn by the Clerk, or Deputy Clerk [fig. 110] of the Circuit Court of Halifax County, Virginia, or by a Notary Public. Thereafter, the Commissioners will, as soon as may be, proceed to view the above described tract of land and proceed to execute their duties as to the ascertainment of the just compensation for the condemnation thereof. The Court hereby sets the fees of said commissioners at the sum of $25.00 per day and expenses.

It is further ordered that the Clerk of this Court forthwith transmit to the United States Marshal for the Western District of Virginia five certified copies of this order and that said Marshal will, as soon as may be, with due diligence, serve a copy of this order on each of the above-named commissioners and the alternate commissioner, and that the Marshal will thereafter make the return to the Clerk's Office of this Court, at Roanoke, showing how and when he has executed this order.

(S.) John Paul, District Judge.

[fol. 111] IN UNITED STATES DISTRICT COURT

Civil No. 296

[Title omitted]

INSTRUCTIONS TO COMMISSIONERS

The Court instructs the Commissioners that in performing your duties you should go upon the land, examine it, hear testimony and consider such testimony along with your personal observation in arriving at your conclusions.

Fair market value is the price which an informed and intelligent purchaser, who desires to buy but is not compelled to buy would be willing to pay, and the price which an informed and intelligent owner, who desires to sell but is not compelled to sell, would be willing to accept for the property.

In determining the fair market value the property should be evaluated on the basis of the highest and best use (i.e. the most profitable and advantageous use) to which it is reasonably adapted at the time of taking or might be adapted in the reasonably foreseeable future, even though the property was not being so used at the time it was taken.

While you must abstain from any speculative or conjectural ascertainments both in the use of the property and in its fair market value, it is proper that the use of the property be measured in respect not only to the time of the taking but to the reasonably foreseeable future.

You must exclude, however, from all your valuations any element of value arising from the availability [fol. 112] of such land for water power purposes due to its being situate on a naviable stream.

Inasmuch as the landowner, with the consent of the Government, has sold all of the growing timber on Tract FF3100E, and the same has already been cut, you should not include the value of such timber in making your determination of the inquiries set forth in the order appointing you commissioners.

In making your determination of fair market value, you should disregard the fact that Virginia Electric and Power Company has a perpetual flowage easement over some of the land involved in this case and that the owner of the fee, Olive Vaughan Williams, and the United States

made an option contract dated April 30, 1951, and you are further instructed that you should not attempt to determine the value of the respective interests of the owner of the fee or of such flowage easement.

John Paul, District Judge.

[fo. 113] In the United States District Court for the Western District of Virginia, at Roanoke

Civil No. 296

Tract No. FF-3100E

[Title omitted]

Order Denying Motion to Direct Commissioners to Make Certain Inquiries—May 1, 1958

This matter comes on for hearing on the attached motion of the plaintiff for an order directing Commissioners to make certain inquiries on the issue of just compensation herein. Plaintiff's motion was made subject to its exception to the appointment of Commissioners for the determination of compensation. After arguments of counsel and after due consideration thereof, plaintiff's motion is denied.

(S.) John Paul, Judge.

May 1, 1958.

[fol. 114] In United States District Court for the Western District of Virginia, Lynchburg Division

Civil No. 296

[Title omitted]

Government's Requested Instructions to the Commissioners

I

The Court instructs the Commission that the single issue for determination is the just compensation to be awarded

for the condemnation of the flowage easements held by the Virginia Electric and Power Company.

II

The Court instructs the Commission that the measure of just compensation for the taking of the flowage easements owned by the Virginia Electric and Power Company is the amount a purchaser ready and willing to buy would pay to a seller ready and willing to sell for the right to use such easements for flowage purposes only and without any consideration or element of value or any use dependent upon water power purposes.

III

The Court instructs the Commission that the flowage easements owned by the Virginia Electric and Power Company are limited by the terms of the conveyances under which the company claims to use only in connec-[fol. 115] tion with the flooding of land as a consequence to the erection of dams.

IV

The Court instructs the Commission that the use of dams by the Virginia Electric and Power Company is further restricted by the terms of the conveyances under which the company claims for power purposes.

V

The Court instructs the Commission that the Virginia Electric and Power Company in answer to interrogatories filed by the Government admitted that the only use which could be made of its flowage rights was for water power purposes.

VI

The Court instructs the Commission that before such dams could be constructed, it would have been necessary to obtain authority from certain federal regulatory agencies, and that at the time of the Government's taking of the flowage easements of the Virginia Electric and Power Company (1) no authority had even been sought by the Virginia Electric and Power Company; and (2) no authority

could have been granted to the Virginia Electric and Power Company at that time because the requirements necessary for the construction of such dams could not have been met by the Virginia Electric and Power Company.

VII

The Court instructs the Commission that because such flowage easements can be used only in connection with the construction of certain dams for water power purposes and it has been held in this case that the flowage easements cannot be valued for such purposes, the flowage rights have no value for flowage purposes.

[fol. 116]

VIII

The Court instructs the Commission that as a matter of law where easements are granted for one purpose, their enjoyment cannot be extended by implication to other purposes inconsistent with the easements granted.

IX

The Court instructs the Commission that as a matter of law the right to use land for the cutting of timber or for agricultural or grazing purposes does no accrue to the owner of flowage easements but such rights can be exercised only by the owner of the fee title to the land, and an injunction could be issued on behalf of the owner of the fee to prevent any such acts of ownership by the owner of the flowage easements.

X

The Court instructs the Commission that as a matter of record the right to cut timber was granted by the owner of the fee title, Olive Vaughan Williams (not Virginia Electric and Power Company), to the Stanley Land and Lumber Co. prior to the Government's institution of this proceeding by a certain timber deed dated August 25, 1950, which conveyed to said company the following quoted rights:

> On a tract of land situated on Dan River in Halifax County, generally known as *Falkland Estates* . . . the right to cut and remove all growing timber located

within the boundary of the line established by the Army Engineers by survey made in the months of June and July, 1950, marking the limits of the permanent power pool on said property to be acquired for the development of the Buggs Island Dam.

XI

The Court instructs the Commission that as a matter of law all acts of ownership, including the present right [fol. 117] to cut timber or for agricultural or grazing purposes, which may be exercised consistent with the Government's use can only be exercised by the owner of the fee, and an injunction could be issued on behalf of the owners of the fee to prevent any such acts of ownership by the Virginia Electric and Power Company.

XII

The Court instructs the Commission that it should take into consideration the fact that the flowage easements owned by the Virginia Electric and Power Company were outstanding as an encumbrance against the land for approximately 45 years, i.e., since 1907, and no acts of ownership were ever exercised by the company as against the owner of the fee, and, further by the terms of the conveyances under which the company claims an affirmative payment was to be made by the company to the owner of the fee in the event it was necessary to cut timber in the exercise of the company's rights as a consequence of the construction of dams for power purposes.

XIII

The Court instructs the Commission that where property is burdened with flowage easements which have never been exercised and highly speculative that they ever could be exercised, the flowage easements at most would have only a nuisance value to a purchaser of the fee who would be desirous of removing such easements as a cloud on the title.

XIV

The Court instructs the Commission that the Virginia Electric and Power Company has the burden of proving the

market value of flowage easements at the time of the Government's taking.

[fol. 118] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT ROANOKE

Civil No. 296

Tract No. FF-3100E

[Title omitted]

MOTION TO CLARIFY THE RECORD—May 27, 1958

The United States of America, plaintiff, by Leigh B. Hanes, Jr., Assistant United States Attorney, having moved this Court to direct the Commissioners appointed by the Court to make certain inquiries, now desires to clarify the record and states that the inquiries were proposed by the plaintiff in an effort to cary out the indicated wishes of this Court but that such inquiries do not reflect the position of the plaintiff.

The position of the plaintiff was orally presented to this Court at the hearing on said motion on May 1, 1958, in the form of proposed instructions to the commissioners, which proposed instructions were orally denied by this Court. Since a court reporter was not present at the hearing, however, plaintiff respectfully moves this Court for a written order denying the plaintiff's proposed instructions to the commissioners which instructions are as follows:

(1) The Court instructs the Commission that the single issue for determination is the just compensation [fol. 119] to be awarded for the condemnation of the flowage easements held by the Virginia Electric and Power Company.

(2) The Court instructs the Commission that the measure of just compensation for the taking of the flowage easements owned by the Virginia Electric and Power Company is the amount a purchaser ready and willing to buy would pay to a seller ready and willing to sell for the right to use such easements for flowage purposes only and

without any consideration or element of value or any use dependent upon water power purposes.

(3) The Court instructs the Commission that the flowage easements owned by the Virginia Electric and Power Company are limited by the terms of the conveyances under which the company claims to use only in connection with the flooding of a land as a consequence to the erection of dams.

(4) The Court instructs the Commission that the use of dams by the Virginia Electric and Power Company is further restricted by the terms of the conveyances under which the company claims power purposes.

(5) The Court instructs the Commission that the Virginia Electric and Power Company in answer to interrogatories filed by the Government admitted that the only use which could be made of its flowage rights was for water power purposes.

(6) The Court instructs the Commission that before such dams could be constructed, it would have been necessary to obtain authority from certain federal regulatory agencies, and that at the time of the Government's taking of the flowage easements of the Virginia Electric and Power Company (1) no authority had even been sought by the Virginia Electric and Power Company, and (2) no authority could have been granted to the Virginia Electric and Power Com-
[fol. 120] pany at that time because the requirements necessary for the construction of such dams could not have been met by the Virginia Electric and Power Company. (The plaintiff is prepared to offer proof in support of the foregoing statements).

(7) The Court instructs the Commission that because such flowage easements can be used only in connection with the construction of certain dams for water power purposes and it has been held in this case that the flowage easements cannot be valued for such purposes, the flowage rights have no value for flowage purposes.

(8) The Court instructs the Commission that as a matter of law where easements are granted for one purpose, their enjoyment cannot be extended by implication to other purposes inconsistent with the easements granted.

(9) The Court instructs the Commission that as a matter of law the right to use land for the cutting of timber or for agricultural or grazing purposes does not accrue

to the owner of flowage easements but such rights can be exercised only by the owner of the fee title to the land, and an injunction could be issued on behalf of the owner of the fee to prevent any such acts of ownership by the owner of the flowage easements.

(10) The Court instructs the Commission that as a matter of record the right to cut timber was granted by the owner of the fee title, Olive Vaughan Williams (not Virginia Electric and Power Company), to the Stanley Land and Lumber Co. prior to the Government's institution of this proceeding by a certain timber deed dated August 25, 1950, which conveyed to said company the following quoted rights:

> On a tract of land situated on Dan River in Halifax County, generally known as *Falkland Estates*—the right to cut and remove all growing timber [fol. 121] located within the boundary of the line established by the Army Engineers by survey made in the months of June and July, 1950, marking the limits of the permanent power pool on said property to be acquired for the development of the Buggs Island Dam.

(11) The Court instructs the Commission that as a matter of law all acts of ownership, including the present right to cut timber or for agricultural or grazing purposes, which may be exercised consistent with the Government's use can only be exercised by the owner of the fee, and an injunction could be issued on behalf of the owners of the fee to prevent any such acts of ownership by the Virginia Electric and Power Company.

(12) The Court instructs the Commission that it should take into consideration the fact that the flowage easements owned by the Virginia Electric and Power Company were outstanding as an encumberance against the land for approximately 45 years, i.e., since 1907, and no acts of ownership were ever exercised by the company as against the owner of the fee, and, further by the terms of the conveyances under which the company claims an affirmative payment was to be made by the company to the owner of the fee in the event it was necessary to cut timber in the exercise of the company's rights as a consequence of the construction of dams for power purposes.

(13) The Court instructs the Commission that where property is burdened with flowage easements which have never been exercised and highly speculative that they ever could be exercised, the flowage easements at most would have only a nuisance value to a purchaser of the fee who would be desirous of removing such easements as a cloud on the title.

[fol. 122] (14) The Court instructs the Commission that the Virginia Electric and Power Company has the burden of proving the market value of flowage easements at the time of the Government's taking.

Dated: May 27, 1958.

United States of America. By (signed) Leigh B. Hanes, Jr., Assistant United States Attorney.

[fol. 123] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA AT ROANOKE

[Title omitted]

ORDER DENYING INSTRUCTIONS AS SUBMITTED BY PLAINTIFF—May 28, 1958

Civil No. 296

Tract No. FF-3100E

On May 4, 1958, the parties hereto submitted to this Court certain proposed instructions relating to the issues to be tried by Commissioners appointed by this Court.

After oral arguments of counsel and due consideration thereof, those instructions submitted by the plaintiff were denied and those submitted by the defendant were granted.

The plaintiff states that the instructions denied by this Court set forth its position relating to the issues herein and in the attached motion, requests the entry of an order denying its proposed instructions.

In consideration whereof,

It is ordered that the instructions as submitted by plaintiff be denied.

(signed) John Paul, Judge.

Enterer May 28, 1958.

[fol. 124] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT ROANOKE

[Title omitted]

Civil No. 296

Tract No. FF-3100E

REPORT OF COMMISSIONERS—June 9, 1958

To: The Honorable John Paul, United States District Judge for the Western District of Virginia:

The undersigned, constituting the commission appointed by the Court in the above entitled proceeding, pursuant to Rule 71A and Rule 53 of the Federal Rules of Civil Procedure by order dated May 1, 1958, to which order reference is hereby made, respectfully submit the following report:

1. Pursuant to the aforesaid order, we met at 10:00 a.m. on the 2nd day of June, 1958, at the Halifax County Court House in Halifax, Virginia, and were sworn by the Deputy Clerk of the Circuit Court of Halifax County, Virginia, a copy of which oath is attached to this report marked Exhibit A. After reviewing together the aforesaid order and the Court's instructions to the commissioners dated May 1, 1958, which had been handed to each commissioner along with the aforesaid order by the United States Marshal serving said order, we met together on the tract of land [fol. 125] identified herein as Tract FF-3100E, consisting of approximately 1840 acres of land, and viewed the same, as well as the adjacent or remaining property of the Falkland Tract, consisting of an additional 5560 acres (approximately), and adjourned the proceedings until 10:00 a.m. on the 3rd day of June, 1958, at Halifax County Court House, Halifax, Virginia, for the purpose of hearing evidence as to values to be adduced by any of the parties interested in the proceeding.

2. On the 3rd day of June, 1958, at 10:00 a.m. we met together at the Halifax County Court House, Halifax, Virginia, for the purpose of hearing evidence. At that time and place, evidence was offered only on behalf of the defendant's, their witnesses being T. W. Clark and R. M. Felton, Sr., two appraisers, who were qualified before the

Commission, who based their findings on their knowledge of land values in the general area; and E. L. Munger, a trained and experienced forester and landowner, who had managed the operations on the Falkland Tract during the past 8 years. The Government did not offer any witness as to value, or as to any other matter, and stated that the Government did not wish to do so as its theory of the case was that, excluding power value, the government's easement was worth only a nominal sum. This hearing was transcribed by a qualified court reporter who has been directed by the commission to file with the Court the original transcript of all the testimony and other incidents at the hearing, together with all exhibits filed or offered at that time, and such transcript and exhibits are requested to be considered by the Court as a part of this report. Arguments were made before the commission in the afternoon of June 3, 1958, and the matter then submitted to the commission by counsel for the Government and the defendant, whereupon the commission adjourned until 11 o'clock a.m. [fol. 126] on June 9, 1958, for further consideration of the matter and for the formulation of its report.

In view of the foregoing, your commission considers it unnecessary to summarize the testimony of any of the witnesses; to comment upon the evidence or to state the basis upon which the witnesses arrived at their opinions of the fair market value or damages except to say that none of the witnesses included in their valuations any element of value arising from the availability of the land for water power purposes. In making its valuations the commission has excluded any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream and has considered the testimony along with their personal observations.

The government did not claim that there were any benefits resulting to the adjacent or remaining property, under the First, Second and Fourth Inquiries, because of the taking and proposed use to be made by the government of the easement taken herein. The evidence showed and, based upon such evidence along with our personal observation, the commission concludes that the adjacent or remaining property, under the First, Second and Fourth Inquiries, has been damaged beyond any peculiar benefits that might ac-

crue to such property from the acquisition of the easement by the United States and converting it to its uses as set out in Exhibit B attached to the afore said order appointing commissioners dated May 1, 1958.

3. In arriving at its conclusions as to value and damages, the commission has followed the Court's directions in the order appointing commissioners and the Court's instructions to commissioners (the reference in such instructions to timber on Tract FF-3100E which had been cut was amended slightly by stipulation of counsel to conform to certain facts about which there was no controversy).

[fol. 127] 4. Accordingly, the commission ascertains and reports the following answers to the four inquiries by the Court:

I

"First: What is the difference between the fair market value of the Falkland Tract, consisting of 7490 acres, with and without the servitude of the Government's easement, as described in Exhibit B hereto attached, over the land in Tract FF-3100E up to contour 330, involving 1340 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?"

Answer: $70,920.00.

In accordance with the directions and instructions of the Court, the commission is of the opinion and does ascertain that in the circumstances involved in the First Inquiry, the fair market value of the Falkland Tract before the taking on October 23, 1952, was $596,000.00 and its value on said date after the taking was $525,080.00; accordingly the sum of $70,920 will be the just compensation, including all damages to the owner or owners of the adjacent or remaining property by reason of the acquisition of the aforesaid easement by the United States and converting it to its uses, as aforesaid, beyond the peculiar benefits that will accrue to such land from said acquisition and use by the United States. At the request of the Government that we should set forth in our report what portion of the just compensation represents damages to the residue (to which request defendant's counsel stated it would not

object); we report that in our judgment such damages amount to $11,120.00.

[fol. 128] II

"Second: What is the difference between the fair market value of the Falkland Tract, consisting of 7400 acres, with and without the servitude of the government's easement, as described in Exhibit B hereto attached, assuming for the purpose of this inquiry that said easement is over the land in Tract FF-3100E up to contour 321 only, involving 1540 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?"

Answer: $65,520.00.

In accordance with the directions and instructions of the Court, the commission is of the opinion and does ascertain that in the circumstances involved in the Second Inquiry the fair market value of the Falkland Tract before the taking on October 23, 1952, was $596,000.00 and its value on said date after the taking was $530,580.00, accordingly the sum of $65,520.00 will be the just compensation, including all damages to the owner or owners of the adjacent or remaining property by reason of the acquisition of the aforesaid easement by the United States and converting it to its uses, as aforesaid, beyond the peculiar benefits that will accrue to such land from said acquisition and use by the United States. At the request of the government that we should set forth in our report what portion of the just compensation represents damages to the residue (to which request defendant's counsel stated they would not object), we report that in our judgment such damages amounts to $11,720.00.

[fol. 129] III

"Third: What is the difference between the fair market value of Tract FF-3100E, consisting of 1840 acres, assuming for the purpose of this inquiry that said tract of land stands alone, with and without the servitude of the government's easement, as described in Exhibit B

hereto attached, over said tract of land up to contour 330, involving 1840 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?

Answer: $59,800.00.

In accordance with the directions and instructions of the Court, the commission is of the opinion and does ascertain that in the circumstances involved in the Third Inquiry, the fair market value of Tract FF-3100E, when not considered as a part of Falkland, before the taking on October 23, 1952, was $73,600.00 and its value on said date after the taking was $13,800.00, accordingly the sum of $59,800.00 will be the just compensation, including all damages by reason of the acquisition of the aforesaid easement by the United States and converting it to its uses, as aforesaid, beyond the peculiar benefits that will accrue to such land from said acquisition and use by the United States.

IV

"Fourth: What is the difference between the fair market value of Tract FF-3100E, consisting of 1840 acres, assuming for the purposes of this inquiry that said tract of land stands alone, with and without the servitude of the Government's easement as described in Exhibit B hereto attached, assuming further that said [fol. 130] easement is over the land in Tract FF-3100E up to contour 321 only, involving 1540 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?"

Answer: $59,500.00.

In accordance with the directions and instructions of the Court, the commission is of the opinion and does ascertain that in the circumstances involved in the Fourth inquiry, the fair market value of Tract FF-3100E, when not considered as a part of Falkland, before the taking on October 23, 1932 was $73,600.00 and its value on said date after

the taking was $14,500.00 accordingly the sum of $59,500.00 will be just compensation, including all damages to the owners or owners of the adjacent or remaining property in said Tract FF-3100E by reason of the acquisition of the aforesaid easement by the United States and converting it to its uses, as aforesaid, beyond the peculiar benefits that will accrue to such land from said acquisition and use by the United States. At the request of the Government that we should set forth in our report what portion of the just compensation represents damages to the residue (to which request defendant's counsel stated they would not object), we report that in our judgment such damages amount to $9,000.00.

Alternate commissioner Wirt Shapard participated in all proceedings of the commission except in the making of these findings and report.

Given under our hands this 9th day of June, 1958.

Respectfully submitted,

Robert S. Weaver, Chairman. J. T. Thompson, James B. Wilborn.

[fol. 131]

Excerpts from the Reporter's Transcript of the Hearing Before the Commissioners on June 3, 1958

Direct examination of THOMAS W. CLARK, Vepco witness.

* * * * * * *

Q. Have you formed an opinion as to the value before and after the taking of the Government's easement in accordance with the Court's four inquiries?

A. Yes, sir.

Q. Mr. Clark, I will ask you the first inquiry which reads: "What is the difference between the fair market value of the Forkland [sic] tract consisting of 7400 acres with and without the servitude of the Government's easement, as described in Exhibit B attached to the order, over the tract of land FF-3100E up to contour 330, involving 1840 acres determined as of October 23, 1952, excluding from

both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?"

A. I think the value of the Falkland Tract of 7400 acres was $644,690.25.

Q. When?

A. As of the date of this taking, October 23, 1952.

Commissioner Weaver:

Q. What was that figure?

A. $644,690.25, as of October, 1952.

Mr. Ferrell:

Q. Now what was the value after the U. S. taking on October 23, 1952?

[fol. 132] A. In my opinion the value was $518,220.25.

Q. And what is the difference between those two values, Mr. Clark?

A. The amount that I think the property owner is entitled to upon this question is $126,470.00, which is the difference between the value before the taking and the value after the taking.

Q. As you have previously testified?

A. That is correct, yes, sir.

Q. Now, Mr. Clark, would you kindly advise the Commissioners how you arrived at the valuation of this property before the taking on October 23, 1952, that is, the tract as a whole? What considerations did you give and how did you come to that overall opinion in valuing it?

A. Well, I used a copy of what appears to me to be an exact copy of that Government map.

Q. You are referring to Government's Exhibit No. 2. You can't see that from where you're sitting, Mr. Clark, so I thought I'd have the record clear that that is the one you're referring to and pointing to.

A. In the land there that is colored blue there is 69.19 acres in some islands, one or two small ones, and I thought the islands were worth $45 an acre, or $3113.55. In that blue land there is 890 acres, and taking out the islands leaves 820.81 acres, which I thought was worth $70.00 an acre or $57,456.70. In other words, I think the value of that blue land is $60,570.25.

Now adjoining it is an area of yellow land, colored yellow, which contains 650 acres, and I thought that land was worth $70.00 per acre, or $45,500.00.

Then there is an area that has been referred to all the time as salmon in color of 300 acres. I thought that land was worth $50 per acre, or $15,000.

Q. May I stop you there and get you to state why it was, or what consideration, if any, made you drop the per acre value of the salmon land, which is between 321 [fol. 133] and 330 to $50 while you placed a value of $70 an acre on the yellow, which is the land lying between 302 and 321 on the Government's map?

A. Well, the salmon land you will find later that I give this tract of land a timber value on the selected cutting basis, and that timber value will add about $32 per acre. That isn't exactly correct, but within a few pennies of it. So that really I am valuing this land at $82 an acre because this salmon land is covered with timber, whereas the blue and the yellow have no merchantable timber on them. So that when I put this value of $50 on the salmon land that is a land value and I am giving a selective timber cutting value that adds, as I say, about $31 an acre, so really I'm putting a value of about $81 on it.

Q. Mr. Clark, what, in your opinion was the highest and best use of the area shown in blue on Government's Exhibit 2 as of October 23, 1952?

A. I think for farming and principally for cultivation. You could also use it for grazing, but I would say that its greatest value was for cultivation, that is to say, agriculture, the raising of crops.

Q. What, in your opinion, was the highest and best use on October 23, 1952, of the land between contour 302 and 321 shown in yellow on Government's Exhibit No. 2?

A. The same use as the blue.

Q. And the highest and best use of the salmon land, I believe you have just testified, as of October 23, 1952, was for growing timber?

A. That was the use it was being put to, but you must bear in mind that if one wanted to—I certainly wouldn't advise it, but if one wanted to they could take this entire tract of land and cut the timber off. Now by cutting it off I mean really cut it off, and then throw it into

pastures and cultivation. I mean it has that suscepti- [fol. 134] bility; that possibility. It is not in my opinion the best way to handle it but it could be done. You don't have to grow trees on it unless you want to because it is all pretty good quality of land, and you could turn it into cultivation at considerable expense naturally and over a period of time.

Q. Did you get down there on the property before it was flooded and look at say the blue land?

A. Oh, I have driven and walked over all of it. I have a four-wheel drive jeep and we walked and drove over all of it.

Q. What kind of soil is it?

A. It's a very good quality of loam soil.

Mr. Hanes:

His answer was not responsive to your question.

A. I meant it to be.

Mr. Ferrell:

I asked him what kind of soil.

Mr. Hanes:

You asked him had he been down there before it was flooded in October, 1952.

Mr. Ferrell:

When it was not flooded.

A. I thought he meant that and I didn't mean to answer something that wasn't that.

Q. What kind of soil did you say?

A. It's a good quality of loam soil.

Q. Is there much sand in there?

A. No, sir; it is not a sandy soil.

Q. I'm sorry I interrupted there. I believe you had advised the Commissioners as to how you had gone [fol. 135] about valuing certain portions, but considering all a part of the tract of the blue land, the yellow land and the salmon land, you just proceed and advise the Commissioners how you arrived at other values in connection with this property?

A. Well, the balance of the land referred to as white on that same map, the white area which embraces 5560 acres, 560 acres of which is open land, and this land is upland and is fair land, it's not the best land that I have ever seen, but it's pretty fair land.

Q. Are you referring to the 5560 acres?

A. The 560 acres of open land. I put that land at $70 per acre, or $39,200.00.

On 20.35 acres as of that date they had a tobacco allotment on 20.35 acres, and in addition to the value I put on the land the base value, I put $1200 per acre tobacco allotment value, or an addition of $24,420.00 on the 20.35 acres, making a total on the 560 acres of open land of $63,620.00.

Q. That was 560 acres of open land?

A. Yes, and that left 5,000 acres of wooded land, and I put the value of that land after the selective cutting of timber at $55 per acre, or $275,000.

When I was there for this purpose I talked to Mr. E. L. Munger and Mr. Munger told me that between the date in 1952——

Mr. Hanes:

We object to his stating what someone told him.

Mr. Ferrell:

We will follow it up with Mr. Munger too.

A. Between this date in October, '53, and the date that this thing became effective in '52, he had cut and sold according to his records $82,500.00 worth of timber on a [fol. 136] selective basis. And then we went over it he showed me what he actuated to be, and looked to me to be correct, of the same quantity and quality of timber that he said was forth the same amount and that they would continue cutting right on then, so I put that timber in at $165,000, and that is the reason that I put that land as low as 55 because that 5,000 acres of wooded land had just had, or was just going to have, $165,000 of selective stumpage cut and removed from it.

Q. Do I understand your testimony as to this timber that you consulted with Mr. Munger, and he showed you the

records which showed that betwen October 23, 1952, and October 23rd, 1953, was it?

A. I don't know about the 23rd, but it was October, '53, a year later.

Q. That according to his records on selective cutting basis he had cut and sold $82,500 worth of timber from the lands of this 5,000 acres?

A. This 5,000 acres of wooded land, yes, sir.

Q. And then you went over the property with Mr. Munger?

A. That is correct.

Q. And he pointed out trees to you that were similar in nature as that that had been cut, and you checked with him as to your opinion?

A. That's right.

Q. And you arrived independently of his that you had at that time, or at least you saw a sufficient quantity to indicate a value there on a selective cutting basis there of an additional $82,000.00?

A. Yes, sir. And he assured me that he was going right on with it, it was a continuing proposition, and there was every evidence there to support that. I mean to say, he showed me where they had cut and the stumps where they had started on this selective, and as they worked up to-
[fol. 137] wards the part that they hadn't done the stumps were completely fresh and they were going right on with it. And that's way I did that.

Q. Have you seen anything on the lands on your subsequent visits, which would either confirm or disaffirm your previous opinion as to that valuation?

A. The evidence I have seen has confirmed and satisfied me that that was correct, and that it established a fair and impartial value.

Q. Now what do those figures add up to?

A. One more item of value there. I took the permanent improvements of $20,000.00.

Q. Now when you valued improvements how did you do that, Mr. Clark?

A. Well, on a tract of that sort, or on any farm—I may be wrong, but not necessarily what these improvements cost or not necessarily what they might be worth as of themselves,

replacement less depreciation, but what I think they add as a value to the whole, not what it alone may be worth.

Q. Do I undstand you to state whether or not you followed the same procedure as to these other items of value which you put in there previously?

A. When you come to timber that's quite a different thing because its kinda like money in the bank, you can take it out if you want it, or you can leave it there if you want it. I mean it's a pretty liquid thing, more than a building on a farm. You can't very well sell me a building and I take it somewhere else, but you can sell trees in a forest and I can cut them and take them away. You understand, I think it's quite different.

Q. The other values that you put in there, were they valued together or separately?

A. Yes, they are a part of the whole and my appraisal of the property is an appraisal as a whole. When it came to permanent improvements themselves I simply estimated [fol. 138] what, in my opinion they added to the value of the whole. I didn't attempt to say they cost $40,000 to duplicate them and to depreciate them 50%. You can do it either way you wish, but I think in country property this is the better and safer method. Everybody doesn't agree with me.

Q. Are those all the factors you considered in arriving at the value before the taking on October 23, 1952 of $644,690.25?

A. Yes, sir.

Q. All right, sir, Mr. Clark, will please state how you arrived at the value of this entire property after the taking on October 23, 1952, of the Government's easement as described in Exhibit A, I believe it is, attached to the Court's order?

A. I arrived at it in this manner. I thought that the blue land of 890 acres at a total value of $60,570.25 is damaged 100%.

Q. Now, would you give us some specific instances, if any, which you might have considered in arriving at that depreciation?

A. Well I have been up there a number of times since the water was impounded, and I think that in the majority of those cases that that blue land has been submerged. It

is submerged so frequently and so long at a time that certainly it has no earthly value of any sort. As a matter of fact the landowner himself is rather punished because he still, as I understand it, owns the fee title and will have to pay the local taxes on something that I can't see how it can be any earthly value to him.

Q. Describe the condition of that blue land when you saw it when it was not submerged?

A. Yes, I did, at least once. I walked over the entire blue land and it was like walking over—I have never seen where a volcano had erupted and spread stuff over the land but [fol. 139] I have heard of it—and it gave me that impression and it was just a complete waste. And one time we had some very dry weather which extended over a period of time, and there were cracks in it that were three and four inches wide and of considerable length, and looking down in them you couldn't see how far down in there they went. What I mean to say, I didn't see how deep they were.

And I also drove over it once in a jeep in about the same conditions. Those are the two times I recall distinctly that I was over it when there wasn't no water on it.

Now there were other times when I was there when there wasn't no water on it, when it was still muddy from the rains or either the water had gone off of it, but I walked in two or more instances to the stream; to the actual normal, natural bank of the stream and of Peter's Creek both, and there was dust there. You couldn't see the water from anywhere on that map. It was not in sight.

Q. And at that patricular time when it was not inundated was it valuable for any purpose that you know of?

A. No, sir.

Q. All right, Mr. Clark, would you proceed. We've covered, I think, the blue land of 890 acres. What about the yellow land as a result of the taking as of October 23, 1952?

A. From everything that I could see the yellow land is damaged 75% of its value. Now the reason I didn't make that 100% is because I think probably some short timber, wetland timber will come in there and grow over the years, yellow oak and sycamore and gum, and possibly some poplar. I'm not so sure whether poplar will grow in there, but yellow oak, sycamore and gum, I think over the years [fol. 140] it would grow there. Of course, in normal times

those timbers don't bring anything much and they are hard to dispose of in peace, and in case of war you can get right sharp money out of them. And I expect it will be a hundred years before there is such a crop of timber on it if it does grow. And I think probably those timbers may grow on it. That is the reason I didn't damage it 100%.

Q. You think that property, which you previously described at its highest and best use before the taking as agriculture, cultivation or grazing purposes, could be used for any of those purposes?

A. I think not, no, sir.

Q. Just limited to what you've previously testified?

A. That is my opinion. I could be mistaken, I don't know, but that's my sincere opinion.

Q. What effect, if any, do you think the imposition of the servitude of the Government's easement will have on the value as of October 23, 1952, of the land between contours 321 and 330, shown in salmon on Government's Exhibit No. 2?

A. Well, that land is at a higher elevation and won't be flooded as frequently in comparison to the blue, and far less frequently than the yellow. I thought it would be damaged 30%.

Q. Of what?

A. Of its value. And I put its value at $15,000. In other words, it was damaged $4500.

The value of the entire property as I said, in my opinion, was $644,690.25. I have said that these three items of damage:

	$60,570.00
	34,125.00
	4,500.00
aggregate	$99,195.25

[fol. 141] Now, assuming I am correct, they aggregate $99,195.25, which deducted from the $644,690.25 value as a whole, leaves a value of $545,495.00.

I think the taking of those lands out of that body of land damages that sum of money 5%, or $27,274.75. Naturally you're paying for this land so you can't damage something you're paying for, and if there is a damage there, and I

put it, after a great deal of thought and consideration, down to 5%. It isn't, as I say a damage on what you're paying for, but the damage on the difference, which is $545,495, or a damage of $27,274.75.

Q. Am I correct in what you have just testified to amounted to $27,274.75 is your opinion of the damage to the residue as it is sometimes called?

A. Yes, sir, that's correct.

Q. Now, why did you damage it 5% rather than 1% or 10%?

A. I just thought and thought about it and considered it and finally arrived at 5% which I think is conservative; I think it's modest; I think it's fair.

Q. Why do you think that the residue is damaged at all?

A. To use an extreme illustration of it you have 7400 acres of land there in a body and would like to say now that taking this 1840 acres doesn't damage it at all. If that's true why not take half of it away. Then I believe anybody with a fair mind would say, "wait now, you've damaged it because you've cut it in half." There is a stopping point and a starting point there, and where it is I don't think anybody knows. I've just tried to be perfectly fair about the thing and I have tried to put the damage down at an extremely low percentage and I think that's true.

In other words, you have 7400 acres of land there. You can now afford to have a forester there and have people [fol. 142] there supervised and run the thing as a commercial timber growing proposition. I think anyone will admit that you couldn't afford to do those things and conduct it properly if you had 100 acres, or you couldn't afford to do it if you had 1000 acres. So somewhere there is a stopping point and every acre you take away from it injures it somewhat from that angle—from the angle of operating it successfully and economically as a merchantable timber growing proposition, and, of course, that is the part of it that appeals to me. I hear people talking about hunting and that's all right and probably a lot of fun, but I'm talking about the dollar that's involved.

Q. You testified a moment back that there were certain agriculture activities on this land, both the upland and the lowland which are involved in the easement. Does that fact

that you're taking away the lowlands have anything to do with that?

A. That is part of this 5% damage. If you were farming that tract of land, that is to say, you would have those low lands to raise a lot of your feed to carry your cattle through the winter on the high ground. Now they have to depend on that 560 acres of open upland to do the whole job and they can't possibly do it as well as they can with the low land to work in with the high lands, and that is one of the reasons for the damage to the residue.

Q. So that is a damage to the upland?

A. Yes.

Q. And you said you didn't care too much personally about the use of this property as a game reserve, but on the date of the taking it was used for that purpose among others?

A. Yes.

Q. Well, considering that from that standpoint what effect, if any, has the taking of an easement over this 1840 [fol. 143] acres have to do with the land as it is after the taking for game reserve purposes and hunting purposes?

A. Well, of course, in low ground like that blue and yellow deer—particularly deer—like to go in places like that to feed. The grasses and stuff that grows in there lends itself to feed for deer better than bushes and trees on the upland do. And in addition to that, of course, turkeys feed in a place like that. I am talking about before the flooding of it. Of course, they all had to come out when the flood was coming through there, but I think that only lasted a few hours or days at the most. It's bound to injure it somewhat, just how much it is hard to tell.

Mr. Hanes:

I haven't objected before, but I believe it would be better to let Mr. Munger testify.

Mr. Ferrell:

This gentleman is testifying as to values, and as I understand the law an expert can consider hearsay things and say what is hearsay and what basis of consideration he gave to it.

A. I took it into account and it was one of the elements that entered into the damage of the 5%, on the residue. I didn't take it into account to any large extent. It is a very small part of the 5%, but I did figure it into account. I didn't estimate it in percentagewise, but I did think about it and realize it would injure it somewhat as a hunting preserve.

Q. Do I understand your testimony that as to the damage to the residue you are of the opinion that as a direct result of the taking of the Government's easement over the 1840 acres the value of the residue of the property outside of the [fol. 144] 1840 acres as of October 23, 1952, has depreciated 5% of its overall value, which was previously testified on several grounds:

One being the last one mentioned, its use of the property as a whole for game reserve purposes after the taking, considering everything.

The other one, as brought out by your statement, is the use of the property for agricultural purposes of the entire property, which has injured the remainder of its value because of the taking; and

Thirdly, which was your first statement, that there was a damage because of—did I understand you to say interference with timber operations?

A. Well, it would be bound to interfere with if somewhat, that's right.

Q. You said a moment ago, several moments ago, that it cut the property in two. I just wish you would elaborate on that?

A. It's more difficult and more expensive now to log that timberland closer to that low ground than it was before, because before you could take the logs out either way. Now you've got to take them away from there, you can't take them across that area. You follow me? Before you could take the logs out wherever it suited you best.

Now another thing that would have to be considered. Before that land was taken by the Government that land down in there was covered with a growth of low-land timber, that is to say, sycamore, gum, and possibly a little elm; timbers that had not the money values, but they were in there and the owner of that property could catch a high market for that quality of stuff and could go down in there

and log for a year or two or three and give his pine a rest for a year or two or three, and still be getting a good income from his timber. And he could just let it lie there until the market did appreciate it and the market on that class [fol. 145] was up. As a long range timber proposition that would lend considerable value. That enters into your element of damage, the consideration of that.

Q. Did you give any value to the timber that was cut off the lowlands?

A. Oh, no, sir, it had been cut.

Q. It had already been gone when you first saw the property?

A. Yes.

Q. So you did not include that in any way shape or form?

A. No, sir. Of course, I saw the stumps of them and looked at them, but more for curiosity than anything else, and it was big heavy low land timber.

Q. Now all those items that you previously testified to as sometimes referred to as damage items, both for the compensation for the rights taken, which is an easement right, and the damage to the residue resulting from the flowage would amount to how much in dollars in your opinion?

A. You mean including the damage to the residue?

Q. Yes, sir.

A. $126,470.00. That is made up of the four items that I have spoken of.

Mr. Ferrell:

I would like to point out to the Commissioners, if you please, that it is customary for the Commission to ask questions as we go along. Now do you want me to proceed with by direct examination in its entirety of all the four inquiries of Mr. Clark, and then ask the Commissioners if they want to question him, or stop after each inquiry and let the Commissioners ask any questions that may have occurred to them during that particular time, and then proceed after the Commission has made any inquiries it desires? Either way, I just wondered which.

[fol. 146] Commissioner Weaver:

Are you through with your questions that you're going to ask in reference to Inquiry No. 1?

Mr. Ferrell:

Yes, sir.

Commissioner Weaver:

I suggest that we adjourn for lunch, and then we will proceed after that. We will adjourn now (12:25 P.M.) for lunch until 1:15 P.M.

Hearing is resumed at 1:15 P.M., and Mr. Clark again takes the witness stand.

Commissioner Weaver:

The Commission does not care to ask any questions at this time. You may proceed with your examination.

Mr. Ferrell:

Mr. Clark will now proceed with the consideration of the second inquiry by the Court, as follows:

"What is the difference between the fair market value of the Falkland tract, consisting of 7400 acres, with and without the servitude of the Government's easement as described in Exhibit B attached to the order appointing Commissioners, assuming that for the purpose of this inquiry that said easement is over the land in tract FF-3100E up to contour 321 only involving 1540 acres determined as of October 23, 1952, excluding from both of said valuations any element of value arising from the availability of such land for water power servitude due to its being situate on a navigable stream?"

[fol. 147] Q. Will you tell us what, in your opinion, as the Court has made inquiry before and after the taking on October 23rd, '52?

A. The value of the entire tract, in my opinion, remains the same, $644,690.

Q. When is that?

A. That is as of the date of the original taking.

Q. Before or after?

A. Well, before.

Q. Before the taking. All right. And of how much? I didn't get that?

A. $644,690.25.

Q. Now what is the value, in your opinion, of this property after the taking considering the easement only up to 321 as of October 23, 1952?

A. The value after the taking, in my opinion, is $521,970.50.

Q. So what is the difference between the fair market value of the Falkland tract before and after the imposition of the servitude of the Government's easement as requested in the Court's second inquiry?

A. The difference is $122,719.75.

Q. Now, Mr. Clark, you have already explained that your value before under this inquiry is the same as the value before in the first inquiry, is that correct?

A. Yes, sir.

Q. And you arrived at those values in the same manner?

A. Yes, sir.

Q. And now the value after the taking of $521,970.50, how did you arrive at that?

A. Well, I think the blue land of 890 acres is damaged 100%, or $60,570. I think the yellow land of 650 acres is damaged 75% of its value, or a damage of $34,125. I think the salmon land of 300 acres is damaged in this instance 5% of its value, or $750.

[fol. 148] Q. Why is that?

A. Well, it's a part of the residue and in my opinion it isn't damaged materially. It suffered some little damage but the damage is very small and I thought 5% of its value.

Q. Any other items?

A. The residue of the property, that is to say, deducting those one, two, three items from it, leaves a value in the whole of $545,495, which I still think is damaged 5%, or $27,274.75, or a total, which is the difference between the values before the taking and the value after the taking, made up these four items, which is $122,719.75.

Mr. Hanes:

Would you repeat that, starting with the value as a whole? You went so fast I didn't get that.

A. I'm sorry.

Mr. Ferrell:

As a whole before the taking $644—

Mr. Hanes:

No, afterwards. After the taking.

A. After the taking—after this taking. $521,970.50.

Mr. Ferrell:

Q. Now, I notice in arriving at your depreciation due to the taking that you came up with a figure for the blue land the same as you did in response to the first inquiry, is that correct?

A. Yes, sir.

Q. And for the same reasons that you have previously testified?

A. Yes, sir.

[fol. 149] Q. And in so far as the depreciation of the yellow land is concerned I notice that you have depreciated that 75%, which you also did in response to the Court's first inquiry?

A. Yes, sir.

Q. Are the reasons for taking that rate of depreciation the same as you have previously testified?

A. Yes, sir.

Q. Now I notice that when you get down to the salmon land, which I believe under the second inquiry now becomes a part of the residue, you depreciate that 5% which is the same rate that you depreciated the so-called white land?

A. Yes, that's coincident. It happens to be the same.

Q. The reasons for your depreciating the residue in the second inquiry are similar to the reasons that you have elaborated upon in response to in the first inquiry?

A. You mean on the salmon land?

Q. And the white land. You have given some reasons?

A. Yes. They're the same.

Q. That is when we went through a depreciation from a hunting reserve standpoint, from an agricultural standpoint?

A. That's correct.

Q. So isn't it true, Mr. Clark, when all is said and done, the difference between your opinion as to the valuation, both before and after the taking, and under inquiry No. 2, is very similar to inquiry No. 1, except that here the easement does not extend as far and doesn't go up to contour

330 but only to 321, and therefore, the 300 acres shown in salmon become a part of the residue instead of being considered as a part of the actual taking?

A. That's correct, yes, sir. In other words, the difference between the value of the tract prior to the [fol. 150] taking under this question 2, and the value after the taking is $122,719.75, which is made up of the four items that I have just described.

Mr. Ferrell:

May the Commission please, that is the extent of our direct examination of this witness under inquiry No. 2. Now, if Commission wishes to ask any questions.

Commissioner Weaver:

We have no questions.

* * * * * * *

Cross examination of THOMAS W. CLARK, Vepco witness.

* * * * * * *

Q. How did you interpret the easement with respect to the rights that were given the Government?

Mr. Ferrell:

I object to that as a leading question as to the interpretation of the rights of the Government as to the easement.

Mr. Hanes:

Q. What did you understand that the easement gave the Government the right to do?

A. On what?

Q. What was the purpose of the Government acquiring the easement, in your opinion?

Mr. Ferrell:

I will have to object to that because it speaks for itself.

[fol. 151] Commissioner Weaver:

I don't think that question is proper.

You might ask him if he understood the extent of the Government's taking.

Mr. Hanes:

Q. All right, put it that way.

A. And what is your question, please.

Q. Did you understand the extent of the Government's taking? The acquisition?

A. I feel so, yes, sir.

Q. All right, sir, what did you understand that extent was?

A. The Government was acquiring the right to overflow these lands.

Q. Then I understood you to say that you considered the highest and best use of this property to be for agricultural purposes, is that correct?

A. Which property, sir?

Q. The land that was flooded.

A. Yes, sir.

. . . . . .

Q. I didn't understand, when you mentioned that you had walked over the entire area noted in blue, when you walked over it?

A. By searching through my notes I could find it, but it would take me possibly an hour to find it. If you want me to find it I will start searching, but it was sometime since the impounding of the water.

Q. That answers my question.

A. All right. On two different occasions. Once I walked all over it, walked right to the banks of those normal streams, Peter's Creek and Banister River, and the other [fol. 152] time we drove a jeep all over it to the bank of both streams, and it was as dry as this floor, as far as moisture is concerned.

Q. I can be mistaken, Mr. Clark, but as I recall your direct testimony, you said the effect of the acquisition of the easement was bound to injure the residue of the 7400 acre tract as a hunting preserve. I believe you made that statement?

A. No, sir, I don't think I actually said as a hunting preserve. If I did here is what I meant; that before the water was impounded in that lake, a place like that bottom is an ideal place for deer to feed. The foliage that grows down there suits their taste better than highland foliage. I mean

you find that is true, and they feed down in there. And the same thing to a lesser extent is true of turkeys. Of course, turkeys get their principal feed certain seasons of the year in the oak woods, they eat acorns, and so do the deer. But in other seasons of the year when the berries are ripe both the deer and the turkeys spend a lot of time in those bottoms.

Q. You mentioned you had worked out a rate of depreciation of residue at approximately 5%.

A. At 5%, yes, sir.

Q. Would you mind explaining again how you arrived at that 5% figure.

A. Well, that's nothing in the world but an opinion. I thought about 10 and I made up my mind that 10 was too great, and I thought of 2 and I knew that was too low, and I finally felt that possibly the fairest percentage that you could arrive at was 5. I mean I have no other explanation for it. It is just a matter of opinion. You might have a different opinion.

Q. Do I take it then that that decision was not based on any factual matter at all?

A. That is correct. I don't believe any man, and I don't believe I could prove it, and I don't believe any [fol. 153] other man could disprove it. He might be just as sincere and have just as much knowledge as my limited knowledge, and as much common sense if I have any, and his opinion might be decidedly different from mine.

Q. Is it a fair statement to say, Mr. Clark, that damage caused by flooding depends upon the nature of the land?

A. It depends upon the nature of the land, but more particularly to the nature of the flow in and the rain off. If you have low ground like that and the Roanoke River floods and comes across that land at a high velocity it will do it as much harm, and in many instances more harm, than any sediment it leaves will do it good. But if you have low ground where the water rises over it and the sediment settles and it drains off slowly and leaves that sediment on the land then a flood can be a tremendous benefit to land.

Now when I went over that land one thing I looked for very carefully was the evidence of any sweep, any current of water. I went over it once immediately after a high water, and I couldn't see where it had scoured or washed off, and I saw no evidence of sand settled on it. It seemed

to be a loam soil and seemed to be in better shape after the flood went off than before. It seemed as though it had settled a desirable sediment on it.

Q. This was when you walked over it?

A. Yes, sir.

Q. Was it the blue land?

A. Yes, sir, and yellow.

Q. The flooding seemed to improve the quality of the soil?

A. Well, not the quality of the soil exactly. The thing that would change the quality of the soil as I say would be a sweeping current that swept over it and washed it out and deposited big rocks on it, but I saw no evidence [fol. 154] of that in this land after this flood. I don't know what the normal thing is. I only saw it under that condition one time. And I saw no evidence of it having deposited big lots of sand. You've seen on low grounds where a current deposited a great deposit of sand in the form of mounds and ridges, and I saw none of that on it.

Mr. Hanes:

All right, sir, that is all. Your witness.

Mr. Ferrell:

We have no further questions.

Commissioner Weaver:

All right, call the next witness.
Witness stands aside.

Direct examination of Raleigh M. Felton, Vepco witness.

Q. Were you employed to form an opinion as to the value of the land consisting of 7400 acres known as the Forkland [sic] tract before and after the easement that was taken by the Government in October, 1952?

A. I was.

Q. Have you served on commissiones of condemnation cases of properties in Halifax County?

A. I have at various times, yes, sir.

Q. Have you testified in cases as to the value of land before and after the taking in condemnation cases?

A. In a sense that is, as to the values to be established for the damages done to property.

Q. Yes, sir, that is what I'm asking.

A. Yes, sir.

Q. Were you furnished a copy of the order of the [fol. 155] Court in this case appointing the Commissioners and directing them to furnish answers to four different inquiries?

A. I was.

Q. Did you study those?

A. Yes, sir.

Q. Were you furnished a copy of the instructions by the Court to the Commissioners in this case as to how to go about making their valuations as to the fair market value and the differences in value before and after the taking in this case?

A. I was.

Q. Did you study those instructions?

A. Yes, sir.

Q. Are you familiar with the 7400 acres of land known generally as the Falkland tract?

A. I am.

Q. How long have you been familiar with that property, sir?

A. Well, practically ever since I have lived in Halifax County.

Q. Which was since what year?

A. 1919.

Q. Well, more specifically, were you familiar with the Falkland tract in the year of 1952, prior to October of that year?

A. Yes, sir.

Q. Were you generally familiar with it after October, 1952?

A. Yes, sir.

Q. And as of today?

A. Yes, sir.

Q. How many times have you been on the property approximately for the purpose of making your appraisal?

A. I've been there twice.

[fol. 156] Q. Have you arrived at an opinion as to the value before and after the Government's taking in accordance with the Court's four inquiries?

A. I have.

Q. Well, now let's first take up the first inquiry, which reads as follows:

"What is the difference between the fair market value of the Falkland tract consisting of 7400 acres with and without the servitude of the Government's easement, as described in Exhibit B attached to the petition, or rather the order appointing Commissioners, over the land in tract FF-3100E up to contour 330, involving 1840 acres determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?"

A. Well, none of these valuations include any element of value of the availability of water power, as I understand it. That is correct, isn't it?

Q. Yes.

A. The first inquiry calls for the valuation of the entire Falkland tract described in Exhibit A, before and after the taking on October 23, 1952, the Government's easement as described in Exhibit B.

In my opinion, the fair market value of the entire tract before the taking was $602,712.55. In my opinion, the fair market value of the tract after the taking is $459,578.00. Therefore, in my opinion, the just compensation in this case should be $144,134.55.

Q. Now, let me stop you there and ask you in formulating those opinions did you follow as best you knew how the instructions given by the Court with the one variation as to the timber that has been cut, not over the entire 1840 acres, but only up to contour 302 or thereabouts?

[fol. 157] A. That's on up to contour 302?

Q. Yes. But you did in formulating your opinions, or did not, attempt to follow the Court's instructions as best you could.

A. I don't believe I quite understand your question.

Q. When you read the Court's instructions did you in formulating your opinion attempt to follow the rules laid down, as you understood them, by the Court?

A. I did, yes, sir.

Q. All right, sir, now would you state the basis for the opinions you have just expressed as to the value before

and after the taking under the circumstances outlined in the first inquiry?

A. I did, and that was on the taking of the Government's easement on October 23rd, which as I have stated above in the amount of $603,712.55. The land below the elevation 302 shown in the blue on the Government's plat——

Q. Incidentally, that plat has been introduced in evidence as Government's Exhibit No. 2, and is on that board across from your witness chair.

A. In other words, the blue is designated as No. 2?

Q. No, the whole plat is.

A. The whole plat, oh, I see.

Q. That is the blue land. I just want to tie in your testimony with that. When you speak of the blue land that is the blue land as shown on Exhibit No. 2, which you see over there on the board.

A. Yes, sir.

Q. All right, sir, and before you proceed further we might clear the way for the balance of your testimony. When you refer later to the yellow land, is that yellow land colored in yellow on that Exhibit No. 2 over there?

A. Yes, sir.

[fol. 158] Q. And the salmon land, is that the land shown in salmon or a reddish color on that Exhibit No. 2?

A. Yes, sir, what you might call the border land there.

Q. And when you refer to the white land, that is the uncolored portion of the plat between the contour lines there and the salmon and the property lines which are shown in brown going up and around to the north?

A. Yes, sir.

Q. I believe you were referring to the blue land and I don't believe that you had previously stated how many acres are involved, had you?

A. Shown in blue embraces 890 acres. And of that area I am advised that 69.19 acres are in the islands as shown on the exhibit, which is known as Pollard's Island in one instance, and FF-3100C and FF-3100E D, the smallest islands. And in my opinion the highest and best use of the blue land is for farming and I valued the blue land as follows:

The island acres 69.19 at $25.00 an acre, which gives a value of $1729.75; and the balance of 820.21 acres at $80.00 an acre, or a value of $65,664.80, or a total for the blue of $67,394.55.

The highest and best use for the area between elevations 302 and 321, consisting of 650 acres, shown in the yellow in Exhibit 2, as you have referred to, on the Government's plat is also for farming, and I valued this yellow land as follows:

650 acres at $80.00 an acres, or a value of $52,000.00.

In my opinion the highest and best use of the area between elevations 321 and 330 shown in salmon, or which you might term as a border part of that colored map, consisting of 300 acres, is either for growing timber and farming, and I value this salmon land as follows:

300 acres at $60.00 an acre or $18,000.00.

[fol. 159] The residue of the Falkland tract upon which the improvements are located consists of 5560 acres. About 560 acres of this land is open land some of which is used for pasturage and farming. I value the white land, the timber thereon, the tobacco allotment which it has, and the improvements as follows:

5560 acres at $20.00 an acre, or $111,200.00; the tobacco allotment——

Q. Let me stop you here. Are we going too fast for the Commission? I noticed some of you making notes, and I will ask the witness to slow down if he's going too fast. Would you mind going a little bit slower.

A. No, sir.

Commissioner Weaver:

He's not going too fast for me.

Mr. Ferrell:

All, right, sir, proceed.

A. The tobacco allotment as of October, 1952, was 20.35 acres, and this I value at $1500.00 an acre. The total amount of which is less $20.00 an acre of the above value of 5560 acres, or a total of $30,118.00.

The standing timber I figured at 8 inches and above. In other words, that is the usual practice for timber buying in

this section; and in this I feel that I have been rather conservative at $300,000.00.

Q. That is the 8 inches and above standing timber?

A. That is correct.

Q. As of October, 1952?

A. 1952.

And the improvements consisting of the main house and other dwellings at $25,000.00

Now the total of the fair market value of the land and improvements of the 5560 acres amounts to $536,318.00, plus the fair market value of the entire Falkland tract be- [fol. 160] fore the taking on October 23, 1952, as stated formerly as $603,712.55,

Q. Now, would you state, what, in your opinion, is the fair market value of the Falkland tract after the taking of the Government's easement on October 23, 1952, according to the facts and circumstances as stated by the Court in its first inquiry?

A. Yes, sir. The fair market value of the Falkland tract after the taking of the Government's easement on October 23, '52, is in the amount of $459,578.00, and is based upon the following:

The blue land is inundated and therefore, the fee owner loses 100% of its use, and therefore, I damaged it at 100% of its value, or $67,394.55.

Any use of the yellow land as farm land has been destroyed entirely, but now the owner may be able to grow some timber on it, although it will be mostly bottom land hardwood, therefore, I damage this yellow land at 7/8ths of the value I placed on it, or $70.00 an acre, which amounts to $45,500.00.

In my opinion the salmon land has been destroyed 50% of its valuation that I placed on it in the amount of $18,000.00 or $9,000.00.

Therefore, in my opinion, the value of the rights taken by the Government, or the damage of the flowage easement upon these 1840 acres amounts to $121,894.55.

As to the damage of the residue, it should be noted that before the Government's taking the landowner's property is fronted on the Banister and Dan Rivers for a total distance of approximately 32,733 feet or 6-2 10ths miles. After

the taking by reason of these numerous fingers, as you will note on the plat, running up into the property that is left the water or river front is considerably broken up. I would estimate it to be almost twice as long as formerly. Thus, in [fol. 161] my opinion, these fingers have considerable effect upon the use of the remaining property by the land owner. Therefore, in my opinion, the value of the remaining white land, consisting of 5560 acres which I had previously estimated to have been worth $111,200.00, has been depreciated 20%, or a total of $22,240.00.

Q. I notice there that in your depreciation of the white land you did not include any effect upon the tobacco allotment, did you?

A. That's correct.

Q. Because for what reason?

A. Well, it can be moved about if the tobacco land is bothered by those fingers it could be on some adjacent property and move it about on the land.

Q. In other words it is not affected?

A. It is not affected by the taking.

Q. I notice you didn't depreciate any value for the improvements or anything else, but just took the bare land value?

A. The bare land value.

Q. Of $20.00?

A. 20%.

Q. Yes.

A. 20% of the $20.00 valuation.

Q. And you did not take any depreciation on the improvements?

A. No, sir.

Q. Or the timber?

A. No, sir.

Q. That you had valued, the merchantable timber. You just took the bare land value and depreciated it, is that correct?

A. That's right. That's due mainly to the reason that especially in high water or in times when the water is consistently standing on the land a man has to travel so much farther to get from here to there, so to speak. I mean it's

[fol. 162] more trouble and a great deal more expensive to operate on land in such a state than would be formerly And all of the foregoing items of compensation, damages, etc., as I said awhile ago, amounts to $144,134.55.

Commissioner Weaver:

Q. Mr. Felton, I haven't got here in my notes the valuation you put on the yellow land before the taking.

A. The yellow land before the taking?

Q. Yes.

A. 650 acres at $80.00 per acre would be $52,000.00.

And deducting the amount I have just stated here in Section B of the first inquiry leaves a total valuation after the taking of $459,578.00.

Mr. Ferrell:

Q. In considering the damages to the residue of 20% of the bare land value did you approach it from the standpoint of the use of the property as a game reserve?

A. No, sir, I did not consider that too much.

Q. You considered it some?

A. Some, but not too much in my estimation.

Q. Did you consider it from the standpoint of a timber operation?

A. Yes, sir.

Q. And did you consider it from the standpoint as an agricultural unit?

A. Yes, sir.

Q. To which one of those factors, or to any other one, did you give the most weight?

A. Well, both for farming and for timbering about the same weight. The timber price is based on the accessibility of the timber and the easy movement of egress and ingress to the cutting areas, and the distance you would have to travel. And also the fact that it does separate the farming [fol. 163] process a great deal because if you have adjacent fields that are easily reached, there is a whole lot of difference in having to travel a mile or two, or 2 or 3 miles at some instances to get around from one field to another and of moving equipment, and things of that kind.

Mr. Ferrell:

That completes our direct examination on the first inquiry. Do any of you Commissioners want to ask Mr. Felton a question before we go to the second inquiry?

Commissioner Weaver:

You may go to the second one.

Mr. Ferrell:

Thank, you, sir.

Q. Now, let's conside for a few minutes, Mr. Felton, the inquiry made by the Court, number second, which is:

"What is the difference between the fair market value of the Falkland tract, consisting of 7400 acres, with and without the servitude of the Government's easement as described in Government's Exhibit B attached to the order appointing Commissioners, assuming for the purpose of this inquiry that said easement is over the land in tract FF-3100E up to contour 321 only, involving 1540 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land water power purposes due to its being situate on a navigable stream?"

A. Well, the way I look at it the second inquiry is similar to the first, except that it is assumed that the Govern-[fol. 164] ment's easement extends only up to contour 321, rather than to contour 330.

My previous appraisals of the fair market value of the entire Falkland tract before the taking on October 23, 1952, is the same, namely, $603,712.55. But here since the easement is assumed to extend only to contour 321, it is my opinion that the fair market value of the entire Falkland tract after the taking on October 23, 1952, of the flowage easement up to 321, is more than in the first inquiry. Here I am of the opinion that the land would then be worth $464,978.00. Thus, just compensation for the landowner under the Court's second inquiry should be $138,734.55. I arrived at my values of a fair market value after the taking as follows:

In this case the blue land is still being taken 100%, and I therefore depreciated it with the full rate of $67,394.55.

Similarly the land, the yellow land, which has been destroyed as good farm land, but now the fee owner may grow some timber thereon although it will consist mostly of bottom land hardwood. I therefore, depreciate the yellow land 7/8ths of its value, or at the rate of $70.00 per acre, which amounts to $45,500.00. Thus, my valuation of the just compensation for the rights taken under the second inquiry amounts to $112,894.55.

My valuation of the resulting damage to the residue in this instance is as follows:

20% of the value of the salmon land, which I have previously valued at $18,000.00; and 20% of the value of the white land, which I have previously valued at $111,200.00, or $25,840.00. Thus the total of just compensation for the rights taken and the damage to the residue amounts to $138,734.55. This means that the fair market value of the [fol. 165] Forkland [sic] tract after the taking has been reduced to $464,978.00.

Mr. Ferrell:

That completes our direct examination of this witness under the Court's second inquiry.

Commissioner Weaver:

You may proceed with the third one.

Mr. Ferrell:

Q. Mr. Felton, we might pause here and ask you this question under both the first and the second inquiries.

You said that in your opinion the fair market value of both the blue and yellow land has been destroyed as a result of the Government's taking?

A. Yes, sir.

Q. Why did you say that?

A. Well, the water easement or flowage over the thing after both of the viewings that I spoke of formerly, would show that a man wouldn't have any chance of raising any crop down there because it would be destroyed from time to time, and I would say consistently so, year in and year out, and for that very simple reason I wouldn't consider the land worth anything other than for what I have stated here, purely for a hardwood growing proposition.

Q. Which is limited to the yellow land?

A. Which is limited to the yellow land only.

Q. In other words, from just your personal observation of that property in going on it, you think, as you have just expressed your opinion, that the fair market value of it is lost?

A. Yes, sir.

[fol. 166] Q. To the extent that you have just testified?

A. Yes, sir.

. . . . . .

Cross examination of RALEIGH M. FELTON, Vepco witness.

. . . . . .

Q. You looked upon this land as primarily a timber tract?

A. Right.

Q. And not generally farming land?

A. Part of it would be timber, and part farm land.

Q. What do you consider the highest and best use of the Falkland Estate?

A. Timber growing and farming.

Q. Which of the two, assuming you have a choice, would you say was the highest and best use.

A. I would say timber.

. . . . . .

Redirect examination of RALEIGH M. FELTON, Vepco witness.

. . . . . .

Mr. Hanes:

I would like to renew my motion to strike as to the 20% damages to the residue. He has submitted that he does not know anything about the flood frequency in so far as they affect these fingers.

Commissioner Weaver:

It goes to the weight rather than to the admissability and I overrule your motion.

Mr. Hanes:

Exception.

. . . . . .

[fol. 167] Direct examination of Ernest L. Mynatt, Vepco witness.

Q. What would you say the yellow land is good for now?
A. Chiefly for growing timber, or it could be used for that.
Q. What do you think it would be worth just for that.
A. About $25.00 an acre.
Q. How much do you think it was worth before this high water?
A. I think $100 an acre.
Q. What do you think about the value of the blue land?

Mr. Hanes:

I object. I don't believe this witness with all due respect to his qualifications as a forester is qualified to talk about land values.

Mr. Easley:

Q. Have you had any experience with land values?
A. I was raised on a farm.
Q. And you've been manager of this one for eight years?
A. Yes, sir.
Q. You think you know how to use land and what land values are?
A. I think I do.
Q. When you study forestry do you study anything about land and land values?
A. That is part of the education.
Q. And you say that blue land is worthless now?
A. I think so.
Q. What do you think of it before the taking by the Government?
[fol. 168] That was the most valuable farm land we had, and it was worth $100.00 an acre.
Q. What effect has it had on your operations of the property to have that acreage in that condition with the blue land completely gone and the yellow land gone so far as agricultural purposes are concerned?
A. On the blue where the water is now has increased the

amount of travel about three miles to our farthest field. It has cut down our grain crop at least half.

Q. How many head of cattle you have now?

A. 27 head now.

Q. Explain to the Commission what has been done in the past year to that property in the way of a game preserve? Has the loss of this bottom land interfered with the propagation of game?

A. The bottom land is covered with water and it has cut down on the feed supply of deer.

Q. Is that a favorable place for deer?

A. There has been many more there than anywhere else. The deer like to feed in the bottom land.

Q. Have you noticed any difference in their habits?

A. I have noticed the amount of damage to our crops, especially this year one field of wheat was completely ruined and it had to be cut for hay. There were no wheat heads in it. The deer are much smaller and not near as many in the last few years.

Q. What do you attribute that to?

A. Mostly to the lack of food during the early season.

Q. What causes the lack of food.

A. Where they have been getting food is covered with water.

Q. Has your timber suffered any?

A. I think that bottom land of timber is damaged at least 75% by water standing up in it.

Q. Have the deer damaged it due to lack of food?

[fol. 169] A. They have eaten all the young pine, and where I have naturally restocked they have eaten practically all of it.

Q. Can you explain the reason for that?

A. The lack of anything else to eat.

Q. How many pine trees have they destroyed?

A. I couldn't tell. I had six acres planted in pine myself, and I would estimate 20 acres. I'm not sure the exact acreage.

Q. How many trees you plant to an acre?

A. About 1,000.

Q. You think that was due to the lack of food in natural grazing places?

A. A food shortage.

Q. You testified that you thought that blue land was worth $100 an acre before the taking for farming?

A. I think it was in the beginning.

Q. Before the dam was built?

A. Yes, sir.

Q. And the yellow land was worth what?

A. About as much.

Q. What percent of the yellow land has any value; what you say it is worth now?

A. All of the yellow land has some value. I think it has decreased 75%.

Q. It is worth $25.00 an acre now?

A. Yes.

Q. Instead of $100 an acre?

A. Yes, sir.

Q. Your operation of this land as timber land and the operation of the farm as a unit has it been injured by the loss of that lowland, bottom land?

Q. Would you give an estimate as to what damage that has done to the entire farm?

A. I would decrease the value of the farm about 15%, at least 15%.

[fol. 170] Q. What percentage of the farm value has been destroyed?

A. I would say at least 50%.

Q. What about the timber?

A. I would rate it at 20%.

Q. As a game preserve?

A. That is down as much as 40% any way.

Q. Has this condition that exists there now interfered with the hunting of deer; what about your deer stands you have them like you used to have.

A. We can only use the yellow land, too much water.

Q. Do the deer stay there when there is water there.

A. They cannot stay there if it is covered with water. The way we hunted before you would scatter the deer up and down in that bottom land and shoot them as they came out into the upland.

Q. How many deer were killed down there for a number of years, about how many?

A. You mean the average for the whole period?

Q. Yes.

A. Just at a guess, 25.

Q. 25 in a season?

A. No for the whole period.

Q. I killed two down there with one shot.

When you said the water was up 315 feet in the Spring how long did it stay that way?

A. Close to two months.

Q. In what way has it affected your operation of the timber business on the salmon land?

A. Right now part of the timber has to be carried so far, and you have to set up new logging mills. The saw mills have to be moved into areas where it could have been the same before the taking.

Q. Do you think it has interfered with the growing of timber?

A. No, I don't think so.

[fol. 171] Q. But it has with your timber operation because you have to set up more mills to saw the timber, is that right?

A. Yes.

Q. It would apply to both the salmon and yellow?

A. Yes.

Mr. Easley:

You may cross examine.

. . . . . .

Cross examination of Ernest L. Munger, Vepco witness.

. . . . . .

Q. I believe that you mentioned this past winter the deer had apparently been pretty hungry and had eaten the pine seedlings and other crops of that type?

A. Yes.

Q. Do you attribute that all of that was due to the fact that the bottom land has been inundated most of the time?

A. Usually that season of the year the deer usually feed on honeysuckle in the bottom land, but the heavy snow could have had something to do with it.

Q. As a matter of fact this past winter has been the most severe of any in a number of years, hasn't it?

A. Yes, sir.

Q. And more than any year you have been there?

A. Yes.

Q. So it couldn't be to the lack of food entirely?

A. That's right.

[fol. 172] STATEMENT BY JAMES S. EASLEY, ESQUIRE.

We base our whole case that the power company had the right to—was to absorb or take from us the right which we purchased to use these lands for a power company, which transferred that much, and the Court has held that it does. But this inquiry here directed by the Judge was to ascertain these four issues, which we've done. What else is there to do? Except for you gentlemen to find out what the answers are from the evidence which is undisputed, and answer to the first, second, third and fourth questions that the Court has submitted to you, and give the Court the figures and then the Court passes upon the legal aspects of it as to what is the amount of money due the power company from the Government for the rights which they have taken. The power company site, the power company value has nothing to do with it.

Now, here again this 850—650 acres of land which the undisputed testimony says is absolutely destroyed, not for power company value, but for value as a farm and the operation of that timber business. But to say that the whole thing must be stricke nout because the thing that we're seeking is power company sites is to deny the very thing the Court sent you here to determine. So I don't see anything to do except to apply the rule and the order of the Court and to assess the damage in accordance with the undisputed testimony that is here, and reconcile any difference between the two and establish the figures and the report which the Court wants you to make and then based upon those the Court will determine the final judgment is my understanding.

[fol. 173] STATEMENT BY COMMISSIONER WEAVER:

The opinion of this Commission that the instructions that it has received from the Court is short, precise and clear, and confines the functions of this Commission within very narrow limits. The last paragraph of these instructions reads as follows:

"In making your determination of fair market value you should disregard the fact that Virginia Electric and Power Company has a perpetual flowage easement over some of the land involved in this case, and that the owner of the fee, Olive Vaughan Williams and the United States, made an option contract dated April 30, 1951.

"And you are further instructed that you should not attempt to determine the value of the respective interest of the owner of the fee or of such flowage easement."

The Commission feels from that language, and it is confined to establishing values here, regardless as to who may fall heir and receive these values. Inasmuch as the Government does not put on any testimony it would seem that the Commission will be restricted to the testimony offered by the defense and perhaps such ideas of valuation as it may have acquired from personal observation of the property.

[fol. 174] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT ROANOKE

[Title omitted]

Civil No. 296

Tract No. FF-3100E

MOTION TO EXCLUDE DAMAGES TO RESIDUE—NOVEMBER 14, 1958

The United States of America, by Leigh B. Hanes, Jr., Assistant United States Attorney, moves the Court to exclude from any award of just compensation to the defendants herein any element of compensation based on

damage to the residue of the land involved and states the following as grounds for its motion:

1. As reflected by the record, the interest acquired in this proceeding is a flowage easement over land owned in fee simple by Mrs. Olive Vaughan Williams. Mrs. Williams owns the "residue" referred to in the report of the commission made June 9, 1958.

2. As reflected by the record, Virginia Electric and Power Company had no interest in or ownership of any part of the "residue" at the time of the acquisition herein.

3. A bona fide settlement has been effected between the owner of the "residue" and the United States of America as will be shown by documentary evidence and [fol. 175] oral testimony referred to in an offer of proof attached hereto as Schedule "A".

(S.) Leigh B. Hanes, Jr., Assistant United States Attorney, Federal Building, Roanoke, Virginia.

Dated: November 14, 1958

Endorsed: Filed Nov. 14, 1958

[fol. 176]

Schedule "A" to Motion to Exclude Damage to Residue

Endorsed: Filed November 14, 1958

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT ROANOKE

Civil No. 296

Tract No. FF-3100E

UNITED STATES OF AMERICA, Plaintiff,

v.

2979.72 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF HALIFAX, VIRGINIA, OLIVE VAUGHAN WILLIAMS, ET AL., AND UNKNOWN OWNERS, Defendants

OFFER OF PROOF

To the Honorable JOHN PAUL, United States District Judge for the Western District of Virginia:

At a pretrial conference on January 13, 1958, this Court decided that the re-hearing in this matter should be held before a commission appointed by the Court and that certain inquiries relating to the issue of just compensation should be made by the commission.

This Court further decided that attorneys for the parties herein should appear before the Court following the re-hearing, and present arguments as to which of the commission's findings and awards should apply in this case; and further, how such awards should be distributed between the fee owner, Mrs. Olive Vaughan Williams, and the defendant, Virginia Electric and Power Company.

[fol. 177] It is to the second of the foregoing purposes of this hearing that this offer of proof is addressed, and, in support of which the following argument is submitted:

I

At the original hearing in this matter, no evidence of the consideration for the option agreement between the plaintiff and Mrs. Olive Vaughan Williams was introduced. On several occasions, counsel discussed the admissibility of certain subjective aspects of the option agreement. (Pages 61, 62, 63, 64, 137. Trans.) At no time was the question of

admissibility of proof of the consideration for the option agreement directly raised.

Since the option agreement was made with the fee owner or owner of the "residue", it is respectfully submitted that proof of consideration is of paramount importance in the Court's ruling on the Government's motion to exclude compensation for damages to the residue.

Aside from the Government's motion, the importance of proof of consideration in the proper determination of compensation has been reflected in the observations of this Court, (136 Trans.), and in the mandate of the Fourth Circuit Court of Appeals, 235 F.2d 327.

II

The United States of America, therefore, offers to prove the elements of consideration itemized below by documents attached hereto as Exhibits 1 through 4 and the testimony of its agents.

a. The United States of America originally proposed to acquire the fee simple title to the tract in question.

b. At the urgent request of the fee owner that she be allowed to retain the fee title to the area included in the Government's acquisition, the Government's plans [fol. 178] were altered so that only a flowage easement was imposed on the tract. (Exhibits 1, 2 and 3.)

c. The option executed between the Government and the fee owner reflects on its face that it was executed "in consideration of $1.00 and other valuable considerations, the receipt and sufficiency of which are hereby acknowledged." (Exhibit 4.) As reflected by the attached Exhibits, mutual promises were made by the Government and the fee owner consistent with the other valuable considerations received.

d. The option agreement included 380 acres not affected by the easement previously owned by the Virginia Electric and Power Company, a tract of considerably more than theoretical value.

e. The option agreement was offered by the fee owner, not the Government. (Exhibit 4.)

United States of America. By (signed) Leigh B. Hanes, Jr., Assistant United States Attorney.

Dated:

[fol. 179] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA AT LYNCHBURG

Civil No. 296

UNITED STATES OF AMERICA, Plaintiff,

v.

2979.72 ACRES OF LAND, MORE OR LESS, IN HALIFAX COUNTY, VIRGINIA, OLIVE VAUGHAN WILLIAMS, ET AL, AND UNKNOWN OWNERS, Defendants

JUDGMENT AND ORDER FOR FINAL DISTRIBUTION—NOVEMBER 24, 1958

This matter comes before the Court on motions of the Defendant, Virginia Electric and Power Company, to confirm and adopt the report of the Commissions herein and to award compensation to the said Defendant and upon the motion of the United States of America, by Leigh B. Hanes, Jr., Assistant United States Attorney, to Exclude Damages to Residue.

It appearing to the Court:

(1). That the Declaration of Taking was filed herein on October 23, 1952.

(2). That from the said Declaration of Taking, the papers filed in this proceeding on behalf of the aforesaid parties, including the stipulation dated January 18, 1954, and the evidence heard in open court on the 18th day of January, 1954, that Virginia Electric and Power Company on October 23, 1952, held a perpetual easement to flood permanently 1,540 acres of the land described herein as Tract No. FF-3100E, parcels A to F.

(3). That by consent of the parties the Court on January 18, 1954, heard evidence and tried the issue of just compensation, and did thereafter enter its final judgment [fol. 180] upon such issue on January 18, 1954, awarding to the said Virginia Electric and Power Company just compensation for the taking of the power company's easement the sum of Sixty-one Thousand Six Hundred Dollars ($61,600.00) exclusive of interest.

(4). That thereafter the United States of America appealed the judgment and final order aforesaid to the United

States Court of Appeals for the Fourth Circuit which Court by decision appearing in 218 F. 2d 524 dated January 5, 1955, affirmed the said judgment and final order aforesaid.

(5). That thereafter the United States of America petitioned the Supreme Court of the United States for writ of certiorari to the United States Court of Appeals for the Fourth Circuit, whereupon the Supreme Court of the United States granted the same, vacated the judgment and remanded the case to the said Court of Appeals for further consideration in the light of the decision in *United States* v. *Twin City Power Co.*, 350 U.S. 222, 350 U.S. 956, January 30, 1956.

(6). That thereafter, the United States Court of Appeals for the Fourth Circuit issued its decision, 235 F. 2. 327, on July 31, 1956, vacating the judgment and remanding the case to this Court with directions to award to the power company as compensation for the taking of the easement condemned by the government the difference between the value of the land with and without the servitude of the easement, excluding from the valuation in both instances any element of value arising from the availability of the land for water power purposes due to its being situate on a navigable stream.

(7). That thereafter, the United States of America petitioned the United States Court of Appeals for the Fourth Circuit for rehearing which that Court denied on September 11, 1956, 237 F. 2d 165.

[fol. 181] (8). That thereafter this matter was returned to this Court by mandate of United States Court of Appeals for the Fourth Circuit with directions to proceed in accordance with the decisions of that Court, whereupon on September 24, 1956, this Court entered its order that further appropriate proceedings herein be had to award to Virginia Electric and Power Company compensation in conformity to the provisions of the aforesaid judgment of said appellate Court.

(9). That the Court overruled the motion of the United States of America for a trial by jury, to which the United States of America excepted, and upon motion of the said Virginia Electric and Power Company, the Court appointed

three disinterested freeholders, agreed upon by the parties, as commissioners to determine the following inquiries.

First: What is the difference between the fair market value of the Falkland Tract, consisting of 7400 acres, with and without the servitude of the Government's easement, as described in Exhibit B hereto attached, over the land in Tract FF-3100E up to contour 330, involving 1840 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?

Second: What is the difference between the fair market value of the Falkland Tract, consisting of 7400 acres, with and without the servitude of the Government's easement, as described in Exhibit B hereto attached, assuming for the purpose of this inquiry that said easement is over the land in Tract FF-3100E up to contour 321 only, involving 1540 acres, determined as of October 23, 1952, excluding from both of such valuations any [fol. 182] element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?

Third: What is the difference between the fair market value of Tract FF-3100E consisting of 1840 acres, assuming for the purposes of this inquiry that said tract of land stands alone, with and without the servitude of the Government's easement, as described in Exhibit B hereto attached, over said tract of land up to contour 330, involving 1840 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?

Fourth: What is the difference between the fair market value of Tract FF-3100E consisting of 1840 acres, assuming for the purpose of this inquiry that said tract of land stands alone, with and without the servitude of the Government's easement as described in Exhibit B hereto attached, assuming further that said easement is over the land in Tract FF-3100E up to contour 321 only, involving 1540 acres, determined as of Octo-

ber 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?

(10). That the said commissioners met at Halifax Courthouse, Virginia, on June 2, 1958, June 3, 1958 and June 9, 1958; viewed the said Tract FF-3100E and the "Falkland Estate" of which the said tract is a part, heard the testimony of witnesses, of Virginia Electric and Power Company, the United States of America having declined to pro- [fol. 183] duce any evidence of value, received exhibits and heard argument of counsel.

(11). That the said commissioners filed their report dated June 9, 1958 in this cause on June 19, 1958, answering the inquiries aforesaid as follows:

I. Answer: $70,920.00.

In accordance with the directions and instructions of the Court, the commission is of the opinion and does ascertain that in the circumstances involved in the First Inquiry, the fair market value of the Falkland Tract before the taking on October 23, 1952, was $596,000.00 and its value on said date after the taking was $525,080.00; accordingly the sum of $70,920 will be the just compensation, including all damages to the owner or owners of the adjacent or remaining property by reason of the acquisition of the aforesaid easement by the United States and converting it to its uses, as aforesaid, beyond the peculiar benefits that will accrue to such land from said acquisition and use by the United States. At the request of the Government that we should set forth in our report what portion of the just compensation represents damages to the residue (to which request defendant's counsel stated it would not object), we report that in our judgment such damages amount to $11,120.00.

II. Answer: $65,520.00.

In accordance with the directions and instructions of the Court, the commission is of the opinion and does ascertain that in the circumstances involved in the Second Inquiry, the fair market value of the Falkland

Tract before the taking on October 23, 1952, was $596,000.00 and its value on said date after the taking was $530,480.00, accordingly the sum of $65,520.00 will be [fol. 184] the just compensation, including all damages to the owner or owners of the adjacent or remaining property by reason of the acquisition of the aforesaid easement by the United States and converting it to its uses, as aforesaid, beyond the peculiar benefits that will accrue to such land from said acquisition and use by the United States. At the request of the government that we should set forth in our report what portion of the just compensation represents damages to the residue (to which request defendant's counsel stated they would not object), we report that in our judgment such damages amount to $11,720.00.

III. Answer: $59,800.00.

In accordance with the directions and instructions of the Court, the commission is of the opinion and does ascertain that in the circumstances involved in the Third Inquiry, the fair market value of Tract FF-310E, when not considered as a part of Falkland, before the taking on October 23, 1952, was $73,600.00 and its value on said date after the taking was $13,800.00, accordingly the sum of $59,800.00 will be the just compensation, including all damages by reason of the acquisition of the aforesaid easement by the United States and converting it to its uses, as aforesaid, beyond the peculiar benefits that will accrue to such lands from said acquisition and use by the United States.

IV. Answer: $59,500.00.

In accordance with the directions and instructions of the Court, the commission is of the opinion and does ascertain that in the circumstances involved in the Fourth Inquiry, the fair market value of Tract FF-310E, when not considered as a part of Falkland, [fol. 185] before the taking on October 23, 1952 was $73,600.00 and its value on said date after the taking was $14,100.00, accordingly the sum of $59,500.00 will be the just compensation, including all damages to the owner or owners of the adjacent or remaining property in said Tract FF-310E by reason of the acquisition of the aforesaid easement by the United States

and converting it to its uses, as aforesaid, beyond the peculiar benefits that will accrue to such land from said acquisition and use by the United States. At the request of the Government that we should set forth in our report what portion of the just compensation represents damages to the residue (to which request defendant's counsel stated they would not object), we report that in our judgment such damages amount to $9,000.00.

(12). That Olive Vaughan Williams, a defendant herein, has stated in open court by her counsel, James S. Easley, that she is asserting no claim to any of the compensation which might be awarded herein other than the $1.00 which has already been paid her.

(13). The opinion of the United States Court of Appeals for the Fourth Circuit, 235 F. 2d 327; reads:

"If Mrs. Williams were the owner of the entire interest in the land, no one would contend that she would not be entitled to compensation for the condemnation of flowage rights by the government. Where these flowage rights have been conveyed to another, there is no reason in law, in equity, in good conscience or in common honesty why the compensation to which she would otherwise have been entitled should not be paid to one to whom such rights have been conveyed."

[fol. 186] The rights of Virginia Electric and Power Company included the right to flood 1540 acres of the "Falkland" tract of approximately 7400 acres. When those rights were originally conveyed any damages to the residue of the land were included in the compensation paid. When the government's easement is imposed upon these same 1540 acres, the residue of the "Falkland" tract is damaged and therefore, if the ownership were in one person the compensation for the taking over these 1540 acres would include damages to the residue. The appellate Court has already decided that this compensation shall be determined and then awarded to Virginia Electric and Power Company. Therefore the issue which the United States now seeks to inject in the case by its aforesaid motion and offer of proof is not within the scope of the direction of the Court of Appeals.

It is therefore, adjudged and ordered by the Court:

(1). After careful consideration of the Report of the Commissioners, their Findings of Fact and the testimony and evidence in the case, it is the Court's opinion that the Report of the Commissioners and their Findings of Fact should be confirmed and adopted by the Court.

(2). After hearing further evidence on behalf of both parties and arguments of counsel, the Motion of the United States of America to Exclude Damages to Residue is overruled and the United States of America has excepted.

(3). The Court holds the Second Inquiry of the order appointing commissioners as the appropriate measure of compensation as directed by the United States Court of Appeal for the Fourth Circuit, and adopts the findings of the commissioners on such inquiry.

(4). That the just compensation to be paid by the plaintiff, the United States of America for the taking of the full, complete and perpetual right, power and [fol 187] privilege to overflow, permanently or intermittently, as may be necessary as a result of the construction, maintenance and operation of the John H. Kerr Dam and Reservoir, as described in the Declaration of Taking heretofore filed in this cause, shall be the sum of Sixty-five Thousand Five Hundred and Twenty Dollars ($65,520.00), exclusive of interest, and that said sum, with interest upon Sixty-five Thousand Five Hundred and Nineteen Dollars ($65,519.00) thereof from October 23, 1952, until the date of payment shall be deposited in the registry of this Court by the plaintiff, the United States of America; and

It is further ordered that upon receipt of the aforesaid sum of Sixty-five Thousand Five Hundred and Nineteen Dollars ($65,519.00), with interest thereon as aforesaid, the clerk of this Court be, and he hereby is, authorized and directed to issue a check in the sum of Sixty-five Thousand Five Hundred and Twenty Dollars ($65,520.00), together with all of the interest paid as aforesaid, payable to the order of Virginia Electric and Power Company, and to mail the said check to said payee, as follows:

Virginia Electric and Power Company,
7th and Franklin Street,
Richmond, Virginia.

The clerk shall mail a certified copy of this order to the bank in which said fund is on deposit, which shall be the authority for said bank to pay the said check when presented.

It is further adjudged and ordered that upon the payment and mailing of the aforesaid check that this judgment be, and is hereby, satisfied.

It is further ordered that the clerk of this Court mail two certified copies of this order to Mr. Leigh B. Hanes, Jr., Assistant United States Attorney, P. O. Box 601, [fol. 188] Lynchburg, Virginia, and three copies to Mr. Ralph H. Ferrell, Jr., care Hunton, Williams, Gay, Moore and Powell, Electric Building, Richmond, Virginia.

November 24, 1958.

John Paul, District Judge.

IN UNITED STATES DISTRICT COURT

Excerpts from the Reporter's Transcript of the Hearings Before the District Court on November 24, 1958

COLLOQUY BETWEEN COURT AND COUNSEL FOR VEPCO.

* * * * * * *

The Court: Mr. Ferrell, what you have said doesn't help me in understanding this case. I can't keep all these cases in mind from year to year. Is this the same alteration we had down at Danville?

Mr. Ferrell: No, sir. I will start at the beginning: This involves the VEPCo flowage easement over the Falkland tract.

The Court: I was under the impression this was the situation: I thought what we had before us here, as you say, was the value of the VEPCo's flowage easements in this certain land. I understood VEPCo had acquired flowage easements covering a considerable tract of land, a considerable portion of this tract. Now the government has gone in there and built this Buggs Island Dam, which took your flowage easement, or took the land over which you had the flowage easement, and that you received compensation for that.

[fol. 189] Mr. Ferrell: That is right, Sir. And on January 18, 1954 at Roanoke, we had a hearing on values, and we had no jury, it was submitted to the Court, and at that time the theory was that inasmuch as we had perpetual flowage easement over 6,199 acres; that the measure of damages would be the fee value for agriculture and grazing and timber purposes, excluding timber, and Your Honor agreed with our view in the case; their position being, owned by the United States, which rendered our VEPCo's flowage easement, permanent or perpetual, valueless: Your Honor disagreed with that. You held that they conceded we had a property right, and you awarded two valuations, put on by VEPCo, on which the government did not offer any evidence, as to values.

That went to the Fourth Circuit and the Fourth Circuit affirmed Your Honor.

And then the government petitioned for certiorari and it went to the Supreme Court of the United States and, right after the decision by the Supreme Court of the United States, in the *Twin Cities case*, which I believe was in January, or a month or so later, the Supreme Court vacated, in our case, the VEPCo case, which we call the 'Falkland case,' they vacated the judgment of the Fourth Circuit and remanded the case for reargument, in the light of the decision of the Supreme Court of the United States in the Twin Cities.

So it went back to the Fourth Circuit, was reargued there, and the Fourth Circuit again held: first, we had rights that were compensable; and we tried to argue, and it is set forth in the Opinion, that since Your Honor had valued our easement right without reference to water power value, that the previous valuation should stand, and final judgment entered for that amount, and the Fourth Circuit said 'No,' because this is interim proceedings and the way we have to [fol. 190] find this thing out, value of VEPCo's interest, disregard the interest VEPCo has, the United States is condemning a different type of easement—the case you heard originally in Danville—that we don't use all those rights——

The Court: (Interrupting) Yes.

Mr. Ferrell: Continuing)—and said it doesn't necessarily follow in the VEPCo case, because the element of

confusion is the VEPCo easement, that VEPCo's easement transfers the right of government's easement to VEPCo.

They disagreed with us, sent it back to Your Honor and said, in this proceedings, we argued this before,—and Your Honor held with us—we disregard the different ownerships, and we value the easement the government is condemning over the entire Falkland tract of 400 acres, part of which is covered by the government's easement, and then we will get that "X dollars" and then decide later how much of that compensation belongs to VEPCo.

Now the Fourth Circuit did say 'Pay it all to VEPCo.' Just taking it literally, you could properly argue, value fixed by the Commission for the government's easement should come to VEPCo because of the destruction of its easement.

. . . . . .

Now the second inquiry is the one we suggested, because we thought that would give the Court a fair yardstick in apportioning the valuations established by the Commissioners for the government's easement; and I tried to put this over in the Fourth Circuit, but did not: VEPCo's easement, by stipulation in this case, only goes up to Contour 321, instead of 330, and of course ours is perpetual and only involves 1540, the second inquiry only takes that [fol. 191] into consideration; just the value of the government's easement, as if it only went up to Contour 321; and then we could see how much of the total should be paid to VEPCo, despite the language of the Court, which could be interpreted to mean we 'could get it all.'

The Court: Who is the government supposed to pay for the easement taken?

Mr. Ferrell: They have settled with Mrs. Vaughan, to pay her for her rights, which they say now is a little different from what they said in the previous hearings before this Court, and in the Briefs they said 'We paid her one dollar for increased servitude over VEPCo's' because they have intermittent flowage rights over this red area. (Indicating on map.)

. . . . . .

The Court: (Indicating) That document Mrs. Williams signed there, you call 'the option,' specifically says that anything she grants or conveys or has been condemned is subject to such rights as VEPCo has?

Mr. Hanes: Yes, sir. However this matter of 'damages to the residue' is a new issue, that has not been raised before. We have never before, as far as I know, throughout the history of this case, had this point raised: that is to say, that VEPCo is entitled to damages to the residue of the land owned by Mrs. Williams.

The Court: I don't understand they are claiming that, now; they want to be paid for what they own.

Mr. Hanes: My understanding, including what they own and damages to the residue.

The Court: Is that right, Gentlemen?

Mr. Ferrell: Two steps: the Fourth Circuit sent this case back and said 'Fix the value of the government's easement, [fol. 192] which is the tract of land before and after the taking,' and that is what has been done, and that was done under each one of the inquiries.

Now at the hearing before the Commissioners—because, naturally, the damages before and after might include some damages to the residue of the tract, so they ask the Condemnation Commissioners, which fix that value: 'Would you also tell us how much of that amount is damages to the residue in that valuation.' and we are again saying, we don't want this thing to come back. We have no objection. We don't think it is relevant, but we don't have any objection to your finding that out, and the Commissioners reported 'so many many dollars' under each one of the inquiries.

Now, they say, their position is: we don't have any rights to that figure, which is a part of the damages before and after the taking, because, they say, you don't own the residue."

Well, that isn't following the case through in its proper chronolgy. When VEPCo obtains its easements—which we are going to pay for today—we hope it is specifically provided in the deed referred to in the option agreement that the damage to the residue—when we obtained our rights we paid for the damages to the residue flowing from our easement, and it is recited there, in so many words,

'damages to the residue' plus we had all these rights in the residue which the government has already conceded, in fact more rights in the residue they conceded than the United States government is taking for its purposes—we had more rights in the residue: we say we paid damages for the residue and when you pay off our easement, you pay us for our easement in toto, not part of our easement. So we say, damages for the residue you are fixing for the government's easement under the second inquiry, because it presupposes our rights stipulated here goes to Contour 321, damages to the residue we paid for.

[fol. 193] So we are entitled to compensation, like the Fourth Circuit said, 'before and after the taking.' As a matter of fact, we could have objected before the Commission and said:—

"We won't answer that specific inquiry, that gets down to itemization, adding up different valuations to different interests," but we said 'No, we will let them make the point.' But our position is, we did have rights in the residue, so we are entitled to compensation, to compensation in that as a share-compensation fixed by the Commission for the government's easement and damages caused by the government's easement.

Mr. Hanes: Your Honor, the inquiries specifically request that the Commissioners include in their consideration any damage to the residue: that is why we made that particular request, with Mr. Ferrell's consent.

Mr. Ferrell: You had to put in 'damages to the residue,' but you were claiming, at that time, benefits. The government has been inconsistent in that; they said 'it was benefits that inured from the government's take to the residue and, under the law, you offset benefits, in the Federal cases, not only against damages to the residue but against the compensation, theoretically, for the land taken, you can offset it against the total amount.' They were claiming at that time they were benefits, and to follow the mandate of the Court, we had to put that in.

They didn't put on any evidence as to benefits, before the Commission.

Mr. Hanes: For whatever reasoning your Order has been used, you are arriving at the situation, our position, where the owner of the easement is being allowed to get an element

of damages normally [inuring] only to the fee-owner, with [fol. 194] whom we have already settled, by allowing VEPCo to be the beneficiary of the damages to the residue.

The Court: Go ahead with whatever you want to.

This case is very much over-complicated. VEPCo owns valuable rights, for which it paid and should be compensated, which may not be based on the idea of potential power development, but if it is for no other reason than value of the land, itself, availability for power purposes.

Mr. Hanes: Since Mr. Ferrell raised this point—this is for the record—the only reason we have not objected to the Report of the Commissioners is that we objected at our hearing on the inquiries and instructions that were propounded to the Commissioners, and we have not felt it necessary to repeat our objections.

Furthermore, while our objection is not in the record, I believe that when we met on June 9th to receive the Report of the Commissioners I indicated at that time, orally, and there was no Reporter present—I indicated at that time we would renew our objections to the inquiries and the instructions, for the record.

Mr. Ferrell: I don't recall that. If you say you did, you did. But I do know you haven't filed any pleading, as required by the Rules, objecting to the Commissioners' Report, as such, and I think there is a Rule on that, as to how long it is you have within which to do that. I have forgotten.

* * * * * * *

Redirect Examination of Robert F. Buford, Vepco Witness.

By Mr. Hanes:

Q. While we are on 'disclaiming interest in this tract,' do you recall any other tracts in which they disclaimed interest in this immediate area?

A. Yes. They disclaimed interest in several tracts farther upstream, what they call our "JJ segment." [fol. 195] Q. Could these tracts have been considered a part of an integrated power site?

A. I don't think so because they were situated a long ways upstream from the Vaughan Estate.

* * * * * * *

COLLOQUY BETWEEN COURT AND COUNSEL FOR VEPCO.

. . . . . .

The Court: I don't know, but it seems to me—of course, I can be convinced otherwise—this second thing is the one more responsive to the situation in this case than anything else.

Mr. Ferrell: That is exactly our position, Your Honor, and that is what our argument is addressed to, why the Court should take No. 2, rather than any of the others—we think we have argument for No. 1. We have been giving in as much as we could, to cut off extraneous matters—we are foregoing what the Circuit Court seemed to imply and take No. 2, perfectly justifiable, and we can justify it upon appeal.

The Court: Now for the moment, we will proceed in regard to No. 2, without definitely committing myself. Now let's hear you on the question of 'residue,' which, they say, of that award of $11,020.00 would represent 'damage to the residue.'

Mr. Ferrell: Taking this as it was submitted to the Commissioners, it was government's easement which was being evalued, that is government's intermittent flowage easement up to 321, over a tract of 7400 acres. We have agreed, by stipulation we have agreed to that, as a fact.

So the proper measure of damages is the before and after: that is, what the whole land was worth before the taking and what it is worth after the taking.

(Further argument)

. . . . . .

[fol. 196] OBJECTION BY GOVERNMENT COUNSEL TO ADOPTION OF REPORT OF COMMISSIONERS

Mr. Hanes: I have a general type of objection to make for the record, that was made previously but not made a part of the record.

I would like to make an objection to the adoption of the Report of the Commissioners with respect to Inquiry No. 2—I believe that is the one you had in mind?—for reasons previously stated and for the additional reason, which I think was stated at our Hearing on Proposed Inquiries, that

we have felt that the phrase 'easement condemned' referred to the easement owned by Virginia Electric Power Company, rather than the total easement rights, total interests acquired by the government.

We have objected on the grounds that the effect of ordering the inquiry, in the words that are used, is to shift the scrutiny of the Commissioners from an examination of the loss to VEPCo to an examination of gain to the United States, and that is the effect of the phraseology of the inquiry, and we feel that the finding adopted in the Order submitted, which you are now considering, makes as its criterion gain to the condemnor, when it should be loss to the condemnee.

The Court: All right, Sir.

Anything else?

Counsel: No, sir.

The Court: Now Gentlemen, I think this Order is very complete, but I think that some transposition is desirable in the text of it. For instance, take Page 6 there: (Further discussion)

Mr. Hanes: There is an objection I would like to make to this one sentence on Page 6: "When those rights were originally conveyed, the residue was obviously damaged and consideration therefor was paid." We believe that the evi- [fol. 197] dence fails to disclose that consideration was paid for easement rights, and we object to the inclusion of that for that reason.

Mr. Ferrell: The deed says so. We rely on the deed saying so. May be just a matter of expression.

(Further discussion)

Mr. Hanes: I stand on the objection I made and I see no point in going into it further.

Thereupon at 3:30 o'clock p.m., the hearing was concluded.

I hereby certify the foregoing pages contain a true and accurate transcript of the testimony and proceedings herein related.

Mary White Beale, Official Court Reporter, United States District Court, Western District of Virginia.

[fol. 198] GOVERNMENT EXHIBITS INTRODUCED AT NOVEMBER 24, 1958 HEARINGS

Easley, Edmunds & Vaughan, Attorneys at Law, South Boston, Virginia and Halifax, Virginia

April 3, 1950.

Mr. R. P. Buford, Boydton, Virginia

DEAR MR. BUFORD: I represent the Vaughan Estate in Halifax County who own a tract of something over seven thousand acres of land on Dan River which will be seriously affected by the Buggs Island Dam. This tract of land has, for a number of years, been devoted exclusively to the conservation of wildlife and is a well known game preserve.

According to the best information we have, the Government will demand title to the land within the three hundred and thirty foot contour level and this would very badly cut up this land and would make it difficult, if not impossible, to maintain a game preserve.

If the Government would be content to take the riparian rights leaving the title to the property in the land owners it would go a long way in alleviating the difficulty which they face, and I am writing to request that you give this suggestion such consideration as you can and let me know the possibility of having the Government take the riparian rights instead of the fee simple title.

Yours very truly, (S.) Jas. S. Easley.

JSE

[fol. 199] CORPS OF ENGINEERS, U. S. ARMY

Office of the District Engineer, Norfolk District, Foot of Front Street, Norfolk 1, Virginia

SAOVR 601.1

P. O. Box 177, Boydton, Virginia

4 April 1950

Mr. Jas. S. Easley, Attorney at Law, South Boston, Virginia

DEAR MR. EASLEY: This is to acknowledge receipt of your letter dated 3 April 1950, requesting that riparian rights rather than a fee simple interest be acquired in certain lands owned by the Vaughan Estate in Halifax County, proposed for acquisition by the Government for use in connection with development of the Buggs Island Reservoir Project.

It has been the policy to acquire a fee simple interest in all lands within the reservoir area; however, your position in this matter is appreciated and your letter is being forwarded to the District Office for consideration and reply.

Very truly yours, R. P. Buford, Project Manager.

[fol. 200] Jas. S. Easley, Robt. T. Vaughan, South Boston, Virginia, Telephone 206.

James E. Edmonds, III, Halifax, Virginia, Telephone 46R.

Easley, Edmunds & Vaughan, Attorneys at Law, South Boston, Virginia, and Halifax, Virginia

June 7, 1950.

Mr. R. B. BUFORD, Boydton, Virginia

Re: Vaughan Estate, Halifax County.

DEAR MR. BUFORD: This letter is written pursuant to our conversation in Halifax on yesterday and refers to the matter discussed in my former letter to you of April 3, 1950, in regard to the acquisition of land or riparian rights from the estate of Mrs. Hannah N. Vaughan in Halifax County.

The situation at present is approximately as follows:

Certain riparian rights have been conveyed and are now owned by the Virginia Electric and Power Company on 6,199 acres of the above estate and these riparian rights would cover the contour up to approximately 318 feet (this is my estimate and would, of course, have to be checked by the Engineers). In addition to this tract there has been subsequently acquired about 380 acres which are not subject to transfer of any riparian rights. If the Government would accept conveyance of riparian rights on this property it would be necessary to acquire from this estate the rights to the contour boundary between the 318 foot level and the 330 foot level on the 6,199 acres, and the entire riparian [fol. 201] rights on the area of about 380 acres.

This entire estate has been used exclusively for the past twenty-five years or more as a conservation project by the owners. The conservation covers timber and the development and propagation of wildlife. There is no agricultural activity on the land except for a few patches of open ground used by the employees who operate the project for their sustenance. In the course of the past twenty-five years the owners have spent large sums of money in the development of this project which at the present time is one of the outstanding conservation projects in the State and the game feature was recently discussed in an article published in the "Virginia Wildlife Magazine."

It can be readily seen that if the Government insists upon taking fee simple title to the area within the 339 foot contour it would mean the loss of probably more than 1,000 acres of the land and over an area which at points would cut the property entirely through and thus destroy the control of the owners over the property so that the maintenance of a game protective area would be impracticable.

For these reasons it has been and is my hope that the Government may be willing to accept riparian rights and leave the ownership and control of the property to the owners so that they may continue their conservation project.

If the Government will accept this suggestion and make an exception of this property on account of its present dedi-

cation to conservation practices the owners would convey whatever additional riparian rights would be needed for a nominal sum.

If any conference is needed to further develop the details of the thought expressed in this letter I will be glad to arrange such a conference at any con- [fol. 202] venient time at which we can furnish any information which might be helpful to you and to others in reaching an answer to the suggestion contained herein.

Your very truly, (S.) Jas. S. Easley.

JSE:w.

Easley, Edmunds and Vaughan, Attorneys at Law, South Boston, Virginia And Halifax, Virginia

April 3, 1950.

Senator A. Willis Robertson, Senate Office Building, Washington, D. C.

DEAR WILLIS:

I am enclosing herewith copy of a letter I am writing to Mr. Buford, who is in charge of the land acquisition office for the Buggs Island Dam in this area.

I hope that you can give this request as much consideration as you can and let me know if the Government's policy is so fixed that an exception could not be made in this case.

With kindest personal regards,

Sincerely, (S.) Jim; Jas. S. Easley.

JSE/r

Enclosure

[fol. 203] UNITED STATES SENATE COMMITTEE ON APPROPRIATIONS

April 4, 1950.

Major General Lewis A. Pick, Chief of Engineers, Department of the Army, Washington 25, D. C.

DEAR GENERAL PICK:

I enclose for your information and such action as you are able to take, corresopndence I have had with honorable James S. Easley of South Boston, concerning the Vaughan Estate in Halifax County. You will note that the owners of that property are hopeful that the Government will be content to take the riparian rights leaving the title to the property in the present owners.

After you have had an opportunity to consider this proposal your kindness in advising me will be appreciated.

With best wishes, I am

Sincerely yours, (S.) A. Willis Robertson.

1 Enc ltr 5 apr 50

[fol. 204] DEPARTMENT OF THE ARMY
Office of the Chief of Engineers
Washington

601.1 Buggs Island Dam and Reservoir Project, Va. and N. C. (Misc.) ENGLP

7 April 1950.

Subject: Acquisition of Lands from the Vaughan Estate —Buggs Island Dam and Reservoir Project

To: The Division Engineers, North Atlantic Division, Corps of Engineers, U. S. Army, New York, New York.

1. There are inclosed copies of correspondence from Senator A. Willis Robertson, Mr. James S. Easley of South Boston, Virginia, and Mr. Easley to Mr. R. P. Buford of Boydton, Virginia, pertaining to the acquisition of lands owned by the Vaughan Estate for use in connection with the Buggs Island Dam and Reservoir Project.

2. It is requested that this matter be investigated and a report thereon submitted, together with a draft of reply to Senator Robertson. The draft should be double spaced.

By Order of the Chief of Engineers:

George F. Meier, Deputy Chief of Real Estate.

[fol. 205] 2 Incls
1. Cy ltr 4 Apr 50 fm Sen Robertson w/1 incl (dup)
2. Cy OCE ltr 7 Apr 50 to Sen Robertson (dup)

In Reply Refer to Congressional Case #9692

Subject: Acquisition of Lands from the Vaughan Estate Buggs Island Dam and Reservoir Project. (7 April 1950.)

NADRF 1st Ind

Office, Division Engineer, North Atlantic Division, New York 7, N. Y. 11 April 1950.

To: The District Engineer, Norfolk District, Corps of Engineers, Norfolk 1, Va.

1. For compliance with request contained in paragraph 2 of basic letter.

2. Report and draft of reply to Senator Robertson should be submitted through this office.

By Order of the Acting Division Engineer:

Henry Walsh, Lt. Colonel, Corps of Engineers, Executive Officer.

2 Incls n/c
(4 cy ea w/d)

NAORE 601.1 (R/R-R/I) 2nd Ind

Subject: Acquisition of Lands from the Vaughan Estate Buggs Island Dam and Reservoir Project. (7 April 1950)

Norfolk District, Corps of Engineers, U. S. Army, Norfolk 1, Va, 4 May 50

To: Division Engineer, North Atlantic Division, Corps of Engineers, U. S. Army, New York 7, N. Y.

1. Investigation of this matter coincides with present detailed studies for real estate acquisition program pro- [fol. 206] posed for the upper reaches of Buggs Island Reservoir, Va. NC. In this respect reference is made to report submitted 22 November 1949, Subject: "Tentative Take Line—BIR—at and above Clarksville, Virginia".

2. The above referenced report is presently being revised and will be resubmitted on or about 9 May 1950.

3. Subject property is located in the upper reaches of the reservoir, on the Dan River and just above the Staunton River State Park.

4. Riparian rights, as referred to in Mr. Easley's letter of 4 April 1950, are interpreted otherwise as meaning *flowage easements*. While the use of flowage easements in Buggs Island Reservoir has been discouraged to date in the reservoir pool proper, it is believed that such are amply sufficient in certain specialized areas, i.e., Clarksville, South Boston, Island Creek Tungsten District and in the upper reaches of the reservoir. In the instant case a comprehensive flowage easement should satisfy all Government requirements.

5. Accordingly, it is recommended that Senator Robertson be advised that consideration will be given to acquisition of a flowage easement over lands of the Vaughan Estate. Suggested draft of such letter is inclosed.

G. T. Derby, Colonel, Corps of Engineers, District Engineer.

3 Incls—

1, & 2, n/c ADDED, 1 Incl. 3. Draft of Reply

Copy furnished: Chief, Engineering Div. Mr. R. P. Buford —Boydton, Va.

LHW/hdp, JHP, GTD.

[fol. 207] Subject: Acquisition of Lands from the Vaughan Estate—Buggs Island Dam and Reservoir Project (7 April 1950)

NADRO 3rd Ind.

Office, Division Engineer, North Atlantic Division, New York 7, New York, 8 May 1950

To: The Chief of Engineers, Department of the Army
ENGLP

1. Preceding 2nd Indorsement and proposed draft of letter appears to presume that a planning report, to be submitted, in which evidently flowage easements are to be recommended, will be approved.

2. Pending submission and approval of the indicated further planning report, this office does not concur in the draft of letter submitted by the Norfolk District and accordingly, a new draft is inclosed and indicated as a Revised Draft.

For the Acting Division Engineer:

Henry Walsh, Lt. Colonel, Corps of Engineers,
Executive Officer.

4 Incls n/c (dup, cy of Incl. 3 w/d) (Incls 1 and 2 n/c)

Added: 1 Incl.

4. Draft of reply identified as "Revised Draft".

CC: DE, Norfolk District NAORE w/cy of Incl. 4

Congressional Case #9692

[fol. 208] DEFENDANT'S EXHIBIT B

This Deed, made this 8th day of June, 1942, between Middle Virginia Power Company, a Virginia corporation, and W. E. Wood, J. M. Costello, H. A. Hitch, H. L. Crumley, and Frank Mayes, being all of the directors of Middle Virginia Power Company, as Liquidating Trustees, hereinafter collectively referred to as the party of the first part, and

Virginia Public Service Company, a corporation organized and existing under the laws of the State of Virginia, hereinafter referred to as the party of the second part;

Whereas, Middle Virginia Power Company has been duly dissolved as of the 8th day of June, 1942; and

Whereas, all of the outstanding capital stock of Middle Virginia Power Company has been surrendered by or on behalf of Virginia Public Service Company and cancelled; and

Whereas, Middle Virginia Power Company has agreed to acquire all of the property, real, personal and mixed, of Middle Virginia Power Company, of whatever kind and wherever the same may be situated, and to assume all of the debts and obligations of Middle Virginia Power Company;

Now, therefore, in consideration of the premises and of the sum of Ten Dollars ($10.00), and other good and valuable consideration in hand paid by the party of the second part to the party of the first part, at or before the execution of these presents, the receipt whereof is hereby acknowledged, the said party of the first part doth hereby grant and convey with covenant of General Warranty of title unto the party of the second part, its successors and assigns forever;

[fol. 209] Campbell and Halifax Counties, Virginia

Parcel 1. The following tracts or parcels of land which were conveyed to the Falkland Estate, Inc., by deed from E. R. Monroe and Elizabeth H. Monroe, his wife, bearing date on the 1st day of May, 1922, and recorded in the Clerk's office of the Circuit Court of Halifax County, Virginia, in Deed Book 130, Page 438, and in the Clerk's office of Campbell County in Deed Book 127, Page 271:

a. That certain tract or parcel of land situate in the County of Campbell, Virginia, near Brookneal on the Staunton River, containing 18¼ acres. Excepting, however, from this real estate, a tract of land containing 2.15 acres which was disposed of by the Grantor to W. M. Puckett by deed bearing date on the 10th day of July, 1912.

b. A certain tract or parcel of land situate in Campbell County, Virginia, adjoining the land described in (a) above.

c. A certain tract or parcel of land situate in Campbell County, Virginia, lying and being on Staunton River just above the Town of Brookneal, Virginia, and containing 6 acres more or less.

d. A certain tract or parcel of land situate in Campbell County, Virginia, lying and being on the Staunton River adjoining the tract described in (c) above, and containing 3 acres more or less.

e. Certain rights to construct a dam across the Staunton River at Puckett's Falls not to exceed the height of 22 feet above the present bed of the river, which rights were acquired by the Tidewater Railway Company, now the Virginian Railway Company by a contract duly re- [fol. 210] corded in the Clerk's office of Campbell County, Virginia, in Deed Book 78, Page 400.

f. A certain Tract or parcel of land situate in Halifax County, Virginia, on Staunton River and containing 4.8 acres more or less.

g. Certain rights reserved by the grantors in a deed to George T. Puckett dated March 10, 1911, and recorded in the Clerk's office of Halifax County, Virginia, in Deed Book 108, page 257, in a tract of land containing approximately 350 acres.

h. A certain tract or parcel of land situate in Halifax County, Virginia, on Staunton River, embracing the old McIvor Mill Site, the McIvor ferry and the canal, being a portion of the McIvor tract, containing 21 acres, 3 rods and 18 poles.

i. The right to purchase from the parties holding title thereto, sufficient land out of a tract of 400 acres embracing the McIcor Mill tract; the Jordan tract and the Hubbard tract for the full and complete development of the water power of Staunton River, not to exceed 50 acres, and to pay for the land so taken, the sum of $10.00 per acre.

j. All riparian rights in a certain tract of 217.54 acres situate in Halifax County, Virginia, and the right to erect and maintain a dam 10 feet high across Staunton River at or above what is known as McIvor Falls.

k. The following contiguous tracts of land situate, lying and being on Staunton River in Campbell County, Virginia, near McIvor's Falls in said river:

i. A tract of land containing 50.6 acres.

ii. A tract of land containing 30 acres.

[fol. 211] iii. A tract of land containing 52¼ acres.

iiii. A tract of land (unsurveyed) containing by estimate 6 acres more or less.

There is excepted from the tracts described in i to iiii, inclusive, a right of way containing approximately 20 acres which was conveyed to the Tidewater Railway Company by W. D. Hill, et al. See Deed Book 80, Page 189.

l. The right to construct a dam across the Staunton River at or near the lower end of the premises of the Grantor where the same adjoins the lands of George S. Mitchell, said dam not to exceed 20 feet in height above the usual low water level and the right to erect an abutment to said dam on the lands of the Grantor, being the same rights reserved by W. D. Hill, R. Holt Easley and wives, in a deed with the Tidewater Railway Company, which deed is duly recorded in the Clerk's office of Campbell County in Deed Book 80 at Page 189.

m. All water and riparian rights on the tract of 400 acres described in (i) above, said tract being situate in Halifax County and embracing the McIvor Mill tract, the Jordan tract and the Hubbard tract, together with all water and riparian rights on the tracts of land in Campbell County adjoining the Peake tract and described in (k) (iiii), containing 99 acres more or less, and known as the Sylvester Elder tract, together with the right to erect a dam or dams across the Staunton River at the site mentioned in (l) above, and to maintain the same, said dam not to exceed 20 feet in height above the usual low water level of said river.

[fol. 212] Parcel 2. The right to build, to rebuild and again to build any dam or dams the said Middle Virginia Power Company may desire across the Dam [sic] River at any point it may desire downstream from the utmost rights conveyed to the said Middle Virginia Power Company by Halifax Power Company and fully set out and reserved in

a deed from Halifax Power Company to Henry T. Hupp, executor of T. T. Hupp estate, dated October 26, 1925 and recorded in the Clerk's office of the Circuit Court of Halifax County, Virginia, so that the normal water level behind said dams shall not be higher than the extreme height which said Middle Virginia Power Company has the right to elevate the waters of said river in the aforesaid deed from Halifax Power Company; together with all riparian rights, water rights, easements and rights of floodage, to the fullest extent of said maximum normal water level, so far as said maximum normal water level concerns or affects the present property of the Falkland Estate, Inc., on either or both sides of the Dan [sic] River, which present property so to be affected consists of approximately 6,199 acres, and was conveyed unto the said Falkland Estate, Inc., by the following persons by deeds of the following dates recorded in the Clerk's office of the Circuit Court of Halifax County, Virginia, in the following Books and on the following Pages, to wit:

(a) From J. E. and W. H. Edmunds and wives, dated May 2, 1917, recorded in Deed Book 118, Page 589.

(b) From Henry H. Edmunds, et al, dated December 10, 1915, recorded in Deed Book 117, Page 128.

(c) From H. H. Edmunds, et ux, dated May 2, [fol. 213] 1917, recorded in Deed Book 118, Page 579, and from H. H. Edmunds and wife, dated May 28, 1920, and recorded in Deed Book 126, Page 423.

(d) From D. F. Harris dated December 9, 1919, and recorded in Deed Book 126, Page 437.

(e) From South Boston Electric Light and Power Company dated January 19, 1920, and recorded in Deed Book 126, Page 378.

(f) From James S. Easley dated May 26, 1920, recorded in Deed Book 126, Page 422.

(g) From Frank R. McKinney, Special Commissioner, dated July 30, 1923, recorded in Deed Book 132, Page 32.

Parcel 3. The right in perpetuity, free of any charges therefor, to abut its dam or dams, on the real estate described in parcel (2) above, and to build its power house or power houses thereon, the right of ingress and egress

thereto and therefrom; the right to use the necessary adjoining land for its purposes of construction and reconstruction and to take therefrom for such purposes, free of charge therefor, all necessary sand, gravel, stone or other construction material; rights of way for necessary transmission line or lines or telephone line or lines; the right to construct a dwelling house and other buildings on the property of the Grantor upon the payment for land so taken at the rate of $40.00 per acre.

The foregoing tracts or parcels of land described in Parcels 1 to 3 inclusive, being the same tracts or parcels of land which were conveyed to the Middle Virginia Power Company by deed from Falkland Estate, Inc., bearing date on the 14th day of October, 1925, and recorded in the Clerk's [fol. 214] office of the Circuit Court of Halifax County, Virginia, on November 5, 1925, in Deed Book 136, Page 227, and at the Clerk's office of Campbell County, Virginia, on December 8, 1925, in Deed Book 144, page 405.

and any and all other property, real, personal and mixed, wherever the same may be situated, now belonging to Middle Virginia Power Company.

The party of the first part hereby covenants that it has good fee simple title to the lands and properties hereinabove described, that it has the right to convey the same, that the said grantee shall have quiet possession of the said lands and properties, that the same is free from encumbrances, that it has done no act to encumber the said lands and properties, and that it will from time to time execute such further and other assurances to the title to said lands and properties as may be necessary and requisite.

To have and to hold unto the said party of the second part, its successors and assigns forever.

In Witness Whereof the said Middle Virginia Power Company has caused its corporate name to be hereunto subscribed, and its corporate seal to be hereunto affixed and attested by its proper officers thereunto duly authorized, and W. E. Wood, J. M. Costello, H. A. Hitch, H. L. Crumley and Frank Mayes, as Liquidating Trustees, have hereunto set their hands and seals on the day and year first above written.

Middle Virginia Power Company, By W. E. Wood, President.

[fol. 215] Attest: J. M. COSTELLO, *Secretary.*

W. E. Wood, J. M. Costello, H. A. Hitch, H. L. Crumley, Frank Mayes, *Liquidating Trustees.*

STATE OF NEW YORK,
County of New York, to-wit:

I, Richard W. Reese, a Notary Public in and for the State and County aforesaid, do certify that W. E. Wood and J. M. Costello whose names as President and Secretary of Middle Virginia Power Company, a corporation, are signed to the writing above, bearing date on the 8th day of June, 1942, have this day acknowledged the same before me in my County aforesaid.

Given under my hand and Notarial Seal this 5th day of June, 1942.

My commission expires on the 30th day of March, 1943.

Richard W. Reese, Notary Public.

STATE OF NEW YORK,
County of New York, to-wit:

I, RICHARD W. REESE, a Notary Public in and for the County aforesaid, in the State of New York, do certify that W. E. WOOD and J. M. COSTELLO, whose names as Liquidating Trustee are signed to the writing above bearing date on the 8th day of June, 1942, have this day acknowledged the same before me in my County aforesaid.

[fol. 216] Given under my hand and Notarial Seal this 5th day of June, 1942.

My commission expires on the 30th day of March, 1943.

Richard W. Reese, Notary Public.

STATE OF NEW YORK,
County of New York, to-wit:

I, RICHARD W. REESE, a Notary Public in and for the County aforesaid, in the State of New York, do certify that H. A. HITCH, H. L. CRUMLEY and FRANK MAYES, whose names as Liquidating Trustees are signed to the writing above bearing date on the 8th day of June, 1942, have this

day acknowledged the same before me in my County aforesaid.

Given under my hand and Notarial Seal this 5th day of June, 1942.

My commission expires on the 30th day of March 1943.

Richard W. Reese, Notary Public.

[fol. 217] DEFENDANT'S EXHIBIT C

This Deed made and entered into this 14th day of October, 1925, by and between FALKLAND ESTATE, INCORPORATED, a corporation heretofore organized and existing under the laws of the State of Virginia, with its principal office at Halifax, which was formerly Houston, Virginia, party of the first part; and MIDDLE VIRGINIA POWER COMPANY, a corporation organized under the laws of the State of Virginia, with its principal office at South Boston, Virginia, party of the second part.

Whereas: At a meeting of the Board of Directors of Falkland Estate, Incorporated, duly held on the 14th day of October, 1925, at the principal office of the Company at Halifax, Virginia, it was ordered by said Board that upon the issuance by Middle Virginia Power Company, party of the second part hereto, unto Falkland Estate, Incorporated, or unto its nominees, nine thousand five hundred (9500) shares of common capital stock of Middle Virginia Power Company; that the President and Secretary of Falkland Estate, Incorporated, were authorized and directed to convey unto Middle Virginia Power Company certain property, rights, privileges and immunities in said resolution set forth, and in the name and on behalf of Falkland Estate, Incorporated, to sign, seal, execute and deliver unto Middle Virginia Power Company a deed in form ample and sufficient, and as liberal as may be approved by counsel of Middle Virginia Power Company, to convey the same unto said Middle Virginia Power Company, and

Whereas; Middle Virginia Power Company has, at the request of Falkland Estate, Incorporated, issued nine thousand five hundred (9500) of its shares of common capital stock unto Southside Virginia Power Company, and is now entitled to the deed aforesaid.

[fol. 218] Now therefore for Ten Dollars ($10.00) and other valuable considerations, paid, receipt whereof is hereby acknowledged, and pursuant to the resolution aforesaid Falkland Etate, Incorporated, doth hereby grant, bargain, sell, and with general warranty doth convey unto Middle Virginia Power Company aforesaid the following property, rights, privileges and immunities, namely:

First: All of the property, easements, rights, privileges and immunities conveyed unto Falkland Estate, Incorporated, by E. R. Monroe and Elizabeth F. Monroe, his wife, and others, by deed dated May 1st, 1922, and duly recorded in the Clerk's Office of the Circuit Court of Halifax County, Virginia, on the 7th day of July, 1922, in Deed Book 130, page 408, and which deed is hereby referred to as if the same were here set out at length; also

Second: The right to build, to rebuild, and again to build any dam or dams the said Middle Virginia Power Company may desire, across the Dan River, at any point, or points, it may desire, down-stream from the uppermost right conveyed unto the said Middle Virginia Power Company by Halifax Power Company, and fully set out and reserved in a deed from Halifax Power Company to Henry T. Hupp, Executor of P. T. Hupp's Estate, dated October 6th, 1925, and recorded, ~~or to be~~ recorded, in the Clerk's Office of the Circuit Court of Halifax County, Virginia, so that the normal water level behind said dam, or dams, shall be not higher than the extreme height to which said Middle Virginia Power Company has the right to elevate the waters of the Dan River, in the aforesaid deed from Halifax Power Company unto the said Middle Virginia Power Company; together with all riparian rights, water rights, easements, and rights of floodage, to the fullest extent of said maxi- [fol. 219] mum normal water level, as hereinabove provided, so far as said maximum normal water level concerns or affects, or may hereafter concern or affect, the present property of Falkland Estate, Incorporated, on either or both sides of the Dan River, which present property so to be affected consists of approximately 6199 acres, conveyed unto the said Falkland Estate, Incorporated, by the following persons, by deeds of the following dates, recorded in the Clerk's Office of the Circuit Court of Halifax County,

Virginia, in the following books and on the following pages, namely:

(a):—From Louisa E. Easley and husband, dated April 29, 1914, recorded in Deed Book 114, page 294.

(b) & (c):—From H. H. Edmonds and wife, dated May 2, 1917, recorded in Deed Book 118, page 579, and from said H. H. Edmonds and wife, dated May 28, 1920, recorded in Deed Book 126, page 423.

(d):—From D. F. Harris and wife, dated December 9, 1919, recorded in Deed Book 126, page 437.

(e):—From South Boston Electric Light & Power Company dated January 19, 1920, recorded in Deed Book 126, page 378.

(f):—From James S. Easley, dated May 26, 1920, recorded in Deed Book 126, page 422.

(g):—From Frank L. McKinney, Special Commissioner, dated July 30, 1923, recorded in Deed Book 132, page 329.

also:

Third: The right in perpetuity, free of any charges therefor to abut its dam, dams, on the aforesaid real estate, [fol. 220] and to build its power house, or power houses, thereon, with rights of ingress, egress, and regress thereto, and therefrom; and with like rights of ingress, egress, and regress on, and along, the margin of the pond, to be created, or as the same may hereafter, from time to time exist; and also the right to use necessary adjoining land for its purposes of construction, and reconstruction and to take therefrom, for such purposes, from time to time, free of charge therefor, all necessary sand, gravel, stone or other construction material, and likewise doth grant unto said Middle Virginia Power Company the necessary right of way, or rights of way, as it may, from to time, determine or desire, to construct, maintain and operate, and to reconstruct, maintain and operate, any or all necessary, or desirable, transmission line or lines, and telephone line or lines; with the right to cut and remove from such right, or rights of way all trees which the said Middle Virginia

Power Company may desire to cut and remove, to an extent of not exceeding fifty (50) feet from the center line of the right of way of either the said transmission line or lines, or said telephone line or lines, for which latter rights of way, for either the transmission lines, or the telephone lines, as of any average width of one hundred (100) feet, the said Middle Virginia Power Company shall pay therefor at the rate of Twenty Dollars ($20.00) per acre; with the further right unto said Middle Virginia Power Company, should it deem it necessary, or desirable, to occupy and re-occupy, and again, from time to time, occupy, such of the present land of the said Falkland Estate, Incorporated, contiguous to the abutment, or abutments of said dam or dams, or power house, or power houses, as may be necessary for the erection thereon, and use therefor, of dwellings with the necessary out-buildings for the operatives of the plant, or plants, of said Middle Virginia Power [fol. 221] Company, the said Company to have the privilege, from time to time, to construct such dwellings and buildings, as its progressive needs may require, upon the payment of the Falkland Estate, Incorporated, its successors or assigns, of the sum of Forty Dollars ($40) per acre for each and every acre so taken as aforesaid.

Fourth: Falkland Estate, Incorporated, doth hereby covenant, to run with the land, that it doth hereby grant and release unto Middle Virginia Power Company all claims for damages, to persons or property of Falkland Estate, Incorporated, its successors or assign, or to the residue of the real estate of Falkland Estate, Incorporated, accrued or that may in time accrue, in or as the result of, anything done, or omitted to be done, by Middle Virginia Power Company, its successors or assigns, within the limits of its rights aforesaid, in the development of the water power aforesaid of the Dan River, including the flooding of any of the present land of the said Falkland Estate, Incorporated, or any part thereof, hereinabove referred to, or in or as the result of anything done or omitted to be done by said Middle Virginia Power Company upon the land herein authorized to be occupied by it, its works or lines, in the construction, maintenance and operation thereof, or of its works, as authorized by law, or by its present, or any future Articles of Association, or any amendment thereof.

Fifth: It is further covenanted and agreed between the parties hereto that Falkland Estate, Incorporated, shall have the right of ingress, egress, and regress to and from the waters of the Dan River, abreast its property aforesaid, at reasonably convenient points of access, and shall have the right to use the waters of said River for ordinary domestic purposes, and for bathing, boating and fishing; [fol. 222] but all such rights of Falkland Estate, Incorporated, hereunder shall be exercised in such a manner as not to interfere with the free and convenient use by Middle Virginia Power Company, its successors or assigns, of the rights, privileges and immunities herein granted, including the right to the development of the water power afforded by the entire flow of the Dan River to the extent hereinabove set forth.

Sixth: It is further covenanted and agreed that the provisions of this deed are hereby covenants running with the land, and, binding upon the parties hereto, their successors or assigns.

Falkland Estate, Incorporated further covenants that it has the right to convey the rights, privileges and immunities herein set forth to the grantee; that the grantee shall have quiet possession thereof; and that it, Falkland Estate, Incorporated, will execute such further assurances hereof as may be requisite; and that it has done no act to encumber the said rights, privileges and immunities.

Witness the following signatures and seals:

Falkland Estate, Incorporated. Per Ira Vaughan, President.

Attest: James F. Penrose, Secretary.

[One $5.00 and six $10.00 Internal Revenue Stamps affixed.]

[fol. 223] State of Virginia,
County of Halifax, to-wit:

I, Patsye Powell, a Notary Public for the County aforesaid, in the State of Virginia, do hereby certify that Ira Vaughan and James F. Penrose, whose names, respectively as President and Secretary of Falkland Estate, Incorporated, are signed to the above writing, bearing date the

14th day of October, 1925, this day personally appeared before me in my County and State aforesaid and acknowledged the same.

Given under my hand this 14th day of October, 1925.

Patsye Powell, Notary Public.

My Commission Expires November 22, 1927.

[fol. 224] DEFENDANT'S EXHIBIT D

This Deed made and entered into this 3rd day of January, 1942, by and between HANNAH N. VAUGHAN (widow) of Philadelphia, Pennsylvania, party of the first part, and MIDDLE VIRGINIA POWER COMPANY, a corporation organized and existing under the laws of the State of Virginia, party of the second part;

Whereas, by deed dated October 14, 1925, recorded in the Clerk's Office of the Circuit Court of Halifax County, Virginia, on the 5th day of November, 1925, in Deed Book 136, page 227, and recorded in the Clerk's Office of the Circuit Court of Campbell County, Virginia, on the 8th day of December, 1925, in Deed Book 144, page 405, Falkland Estate, Incorporated, granted and conveyed to Middle Virginia Power Company certain property, easements, rights, privileges, powers, and immunities, particularly set forth and described in paragraphs "First" to "Sixth", both inclusive, to which reference is here made; and

Whereas, in paragraph "Second" of said deed, there is set forth in subparagraphs (a) to (g), both inclusive, certain deeds under which Falkland Estate, Incorporated, acquired property with respect to which certain of the property, easements, rights, privileges, powers, and immunities were granted to Middle Virginia Power Company; and

Whereas, the deed described in said subparagraph (a) of said paragraph "Second" of said deed was not to Falkland Estate, Incorporated, and did not convey any property to Falkland Estate, Incorporated; and

Whereas, two certain deeds to Falkland Estate, Incorporated, namely, deed from J. E. and W. H. Edmunds and wives, dated May 2, 1917, recorded in the Clerk's Office of

the Circuit Court of Halifax County, Virginia, in Deed Book 118, page 589, and deed from Henry H. Edmunds et al to [fol. 225] Falkland Estate, Incorporated, dated December 10, 1915, recorded in said Clerk's Office in Deed Book 117, page 128, conveyed certain property therein described to Falkland Estate, Incorporated, and should have been included in said list of deeds contained in said paragraph "Second" of said deed of October 14, 1925, from Falkland Estate, Incorporated, to Middle Virginia Power Company; and

Whereas, the deed from Halifax Power Company to Henry T. Hupp, Executor of P. T. Hupp's Estate, referred to in said paragraph "Second" of said deed of October 14, 1925, from Falkland Estate, Incorporated, to Middle Virginia Power Company, as having been dated "October 6, 1925" was in fact dated June 6, 1925, and was recorded in the Clerk's Office of the Circuit Court of Halifax County, Virginia, on June 15, 1925; and

Whereas, the last two or three lines of paragraph "Third" of said deed of October 14, 1925, from Falkland Estate, Incorporated, to Middle Virginia Power Company reading "upon payment *of* the Falkland Estate, Incorporated, its successors or assigns, of the sum of Forty Dollars ($40) per acre for each and every acre so taken as aforesaid," should have read "upon the payment *to* the Falkland Estate, Incorporated, its successors or assigns, of the sum of Forty Dollars ($40) per acre for each and every acre so taken as aforesaid"; and

Whereas, by deed dated October 26, 1926, and recorded in the Clerk's Office of Halifax County, Virginia, in Deed Book 139, page 564, Falkland Estate, Incorporated, conveyed to the said Hannah N. Vaughan all of its property and rights, the said Hannah N. Vaughan being the owner of all the outstanding capital stock of said Falkland Estate, Incorporated; and

Whereas, it is the desire of the parties hereto to correct said omissions and errors in said deed of Octo- [fol. 226] ber 14, 1925, from Falkland Estate, Incorporated, to Middle Virginia Power Company;

Nor, Therefore, This Deed Witnesseth:

That for and in consideration of the premises and of the sum of One Dollar ($1) cash in hand paid to the said

Hannah N. Vaughan by said Middle Virginia Power Company, the receipt of which is hereby acknowledged, said party of the first part does hereby grant and with special warranty doth convey unto Middle Virginia Power Company all the property, easements, rights, privileges, powers, and immunities mentioned and described in paragraphs "Second" to "Sixth", both inclusive, of said deed of October 14, 1925, from Falkland Estate, Incorporated, to Middle Virginia Power Company, with respect to the property conveyed to said Falkland Estate, Incorporated, by said deed from J. E. and W. H. Edmunds and wives, dated May 2, 1917, recorded in the Clerk's Office of the Circuit Court of Halifax County, Virginia, in Deed Book 118, page 589, and by deed from Henry H. Edmunds, et al., dated December 10, 1925, and recorded in said Clerk's Office in Deed Book 117, page 128, as fully and as completely to all intents and purposes as if said two deeds had been included in the list of deeds set forth in subparagraphs (a) to (g), both inclusive, of paragraph "Second" of said deed of October 14th, 1925, and as fully and as completely as if the property, easements, rights, privileges, powers and immunities set forth in said paragraphs "Second" to "Sixth", both inclusive, of said deed of October 14, 1925, from Falkland Estate, Incorporated, to Middle Virginia Power Company, were here again set forth with respect to the property conveyed to said Falkland Estate, Incorporated, by the two aforesaid deeds.

[fol. 227] And this deed further witnesseth:

1. That it was the intent and purpose of the parties to said deed of October 14, 1925, from Falkland Estate, Incorporated, to Middle Virginia Power Company, to refer, in paragraph "Second" thereof, to deed of June 6, 1925, from Halifax Power Company to Henry T. Hupp, Executor of P. T. Hupp's Estate, instead of to deed from said Halifax Power Company to Henry T. Hupp, Executor of P. T. Hupp's Estate, dated October 6, 1925; and said paragraph "Second" of said deed of October 14th, 1925, is hereby amended so that the date of said deed from Halifax Power Company to Henry T. Hupp, Executor of P. T. Hupp's Estate shall read "June 6, 1925" instead of October 6, 1925.

2. That it is hereby agreed between the parties hereto that the word "of", appearing after the word "payment" and before the words "the Falkland Estate, Incorporated", in the last few lines hereinabove quoted from paragraph "Third" of said deed of October 14, 1925, from Falkland Estate, Incorporated, to Middle Virginia Power Company, should be "to" and said deed of October 14, 1925, from Falkland Estate, Incorporated, to Middle Virginia Power Company, is hereby corrected so that said word shall be "to" instead of "of".

Witness the following signature and seal on the day and year first above written.

Hannah N. Vaughan.

STATE OF PENNSYLVANIA,
City of Philadelphia, to-wit:

I, KARL F. A. HILL, a Notary Public in and for the City and State aforesaid do certify that Hannah N. Vaughan, (widow) whose name is signed to the writing above bearing date on the 3rd day of January, 1942, has acknowledged [fol. 228] the same before me in my city and state aforesaid.

Given under my hand and official seal this 3rd day of January, 1942.

Karl F. A. Hill, Notary Public.

My Commission Expires March 5, 1943.

[fol. 229] DEFENDANT'S EXHIBIT E

THIS DEED, Made this the first day of May, 1907, between Banister-Dan Mills Company, a corporation duly chartered and existing by and under the laws of the State of Virginia, party of the first part, and the South Boston Electric Light and Power Company, a corporation duly chartered and existing by and under the laws of the State of Virginia, party of the second part:

Witnesseth: That for and in consideration of the sum of five thousand dollars ($5,000) in hand paid by the said party of the second part to the said party of the first part,

the receipt whereof is hereby acknowledged, the said Banister-Dan Mills Company doth grant and convey unto the said South Boston Electric Light and Power Company, with general warranty of title, the undivided one third (1/3) interest of the said Banister-Dan Mills Company in the following property, to-wit: Three several tracts of land in Red Bank and Roanoke Magisterial Districts, Halifax County, Virginia, on the south and north sides of Dan River, contigous to the falls or rapids of said river known as Hyco Falls, and containing, in the aggregate, about five hundred acres, said several tracts of land being more specifically described as follows:

1st. The land on the south side of Dan River and the island in Dan River known as Pollard's Island, conveyed to said Banister-Dan Mills Company by Frank W. Woltz, by deed dated March 9, 1900, and recorded in the Clerk's Office of Halifax County in deed book 93, page 133, and in said deed described as follows: "The island of Dan River in Halifax County, Va., near the mouth of Hyco River, known as Pollard's Island, containing about fifty (50) acres, more or less; also the land lying on Dan River on the south side thereof along that portion of the Dan River [fol. 230] known as Hyco Falls, in part opposite said Pollard's Island, bounded by the lands of Banister Dan Mills Company, Jones, Willingham and Dan River, containing by plat of M. French, Surveyor, made January 17, 1900, and duly recorded, fifty five and nine tenths (55 9 10) acres and bounded as follows: Beginning at a pine in Jones' lines, thence off on new line S. 67 E. 450 feet to a rock, thence S. 28¾ E. 965 feet to a road leading to Woltz's house, thence S. 7¾ E. 1020 feet to a rock in Willingham's line, thence Willingham's line N. 76 E. 2180 feet to a rock on the bluff, thence N. 55½ E. 132 feet to a small ash on Dan River, thence by the same course 15 feet to the water's edge, thence up Dan River as it meanders to what was formerly Jones' line S. 81½ W. 680 feet to the beginning;

2nd. One acre of land adjoining the same, conveyed to said Banister-Dan Mills Company by W. H. Jones and others by deed dated January 27, 1899, recorded in the Clerk's Office of Halifax County in deed book 95, page 127, to which reference is hereby made for a more complete description;

3rd. A tract of land on the north side of Dan River opposite the above mentioned tracts, being a portion of the tract owned by said Banister-Dan Mills Company known as Falkland, containing three hundred ninety six (396) acres according to survey and plat made by E. R. Farmer, D. S. H. C., October 16, 1905, and bounded as follows: Beginning at an elm on Dan River near the head of the rapids known as Hyco Falls and near the mouth of an old canal, thence N. 27 E. 40 chains to a stone, thence S. 63 E. 103 chains to a stone, thence S. 27 W. 40 chains to an ash on Dan River a short distance below the mouth of Peter's Creek, thence up the river as it meanders N. 57 W. 1.60 chains, N. 70½ W. 6.50 chains, N. 74½ W. 3.37 chains, N. 81⅛ W. 3.57 chains, N. 70¼ W. 4 chains, N. 86 W. 4.42 [fol. 231] chains, N. 64½ W. 3.65 chains, N. 33 W. 640 chains, N. 25½ W. 3 chains, N. 40¼ W. 3 chains, N. 56¼ W. 3.97 chains, N. 54⅝ W. 9.09 chains, N. 55½ W. 8. chains, N. 45 W. 5.10 chains, N. 54¼ W. 5.56 chains, N. 55½ W. 6.22 chains, N. 80¼ W. 1.88 chains, N. 57¼, W. 5.67 chains, N. 52½ W. 4.27 chains, N. 59¾ W. 5.73 chains, N. 89 W. 2.18 chains, S. 74⅝ W. 2.11 chains, N. 85¾ W. 1.70 chains, S. 81½ W. 3.89 chains, S. 71 W. 2.92 chains, S. 87⅞ W. 2.52 chains to the beginning;

4th. The water rights, water power and water privileges owned by said Banister-Dan Mills Company incident to said land, and the privilege to construct a dam or dams or other works on said land to raise the water at the head of said Hyco Falls six (6) feet high above the usual water level without requiring compensation for any damages thereby to any land owned by said Banister-Dan Mill Company on Dan River;

The undivided one third interest herein conveyed in the property hereinbefore conveyed being the residue vested in said Banister-Dan Mills Company after having conveyed to J. J. Lawson and other an undivided two thirds interest in same by deed dated June 28, 1906, and duly recorded in the Clerk's Office of Halifax.

And the said party of the first part hereby covenants that it is seized in fee simple of the property herein conveyed; that it has the right to convey the same; that it has done no act to encumber it; that said grantee herein shall

have quiet possession of the same, free from all incumbrances; and that it will execute such other and further assurances thereof as may be requisite.

In testimony whereof said Banister-Dan Mills Company has caused its corporate name to be signed to these presents by E. Schaefer, its president, and its [fol. 232] corporate seal to be hereto affixed and attested by R. Holt Easley, its secretary.

Banister-Dan Mills Company, by E. Schaefer, President. (Seal.)

Attest: R. Holt Easley, Secretary.

STATE OF VIRGINIA,
City of Lynchburg, to-wit:

I, L. M. PERRY, a Notary Public in and for the City aforesaid, in the State of Virginia, do hereby certify that E. Schaefer, whose name as President of the Banister-Dan Mills Company is signed to the foregoing writing, bearing date on the 1st day of May, 1907, has acknowledged the same before me in my City aforesaid, and he further made oath that the corporate seal thereto affixed is the true corporate seal of said Company, and that it was affixed thereto by due authority and that said writing was executed on behalf of said Company by due authority.

Given under my hand this the 1st day of May, 1907.

L. M. Perry, Notary Public.

My commission expires on the 8th day of March, 1911.

CITY OF WASHINGTON,
District of Columbia, to-wit:

I, LILLIE V. MCCULLEN, a Notary Public in and for the City aforesaid, in the District of Columbia, do hereby certify that R. Holt Easley, whose name is signed as Secretary of the Banister-Dan Mills Company to the [fol. 233] foregoing writing, bearing date on the 1st day of May, 1907, has acknowledged the same before me in my District aforesaid; and he further made oath that the corporate seal thereto affixed is the true corporate seal of said Company and was affixed thereto by due authority.

Given under my hand and official seal, this the 20th day of May, 1907.

Lillie V. McCullen, (Seal), Notary Public, D. C.

My commission expires on the 10th day of January, 1910.

[fol. 234] DEFENDANT'S EXHIBIT F

This deed made this the 1st day of May 1907, between J. J. Lawson and Eliza Lawson, his wife, R. W. Lawson and Mary Lawson, his wife, Joseph Stebbins and Willie Stebbins, his wife, R. S. Barbour and Bessie K. Barbour, his wife, and J. A. Mebane and Susan A. Mebane, his wife, parties of the first part and the South Boston Electric Light and Power Company, a corporation duly chartered and existing by and under the laws of the State of Virginia, party of the second part, all of Halifax County, Virginia Witnesseth: That for and in consideration of the sum of TEN THOUSAND DOLLARS ($10,000) in hand paid to the said parties of the first part by the said party of the second part, the receipt whereof is hereby acknowledged, the said parties of the first part do grant and convey unto the said South Boston Electric Light and Power Company, with general warranty of title, their undivided two-thirds (⅔) interest in the following property, to wit: Three several tracts of land in Red Bank and Roanoke Magisterial Districts, Halifax County, Virginia, on the south and north sides of Dan River, contiguous to the falls or rapids of said river known as Hyco Falls, and containing in the aggregate, about five hundred acres, said several tracts of land being more specifically described as follows: 1st. The island in Dan River in Halifax County, Va., near the mouth of Hyco River, known as Pollard's Island, containing about fifty (50) acres, more or less; also the land lying on the south side of Dan River along that portion of Dan River known as Hyco Falls, in part opposite said Pollard's Island, bounded by the lands of Banister-Dan Mills Company, Jones, Willingham and Dan River, containing by plat of M. French, Surveyor, made January 17, 1900, and duly recorded, fifty five and nine tenths (55 9/10) acres and bounded as follows: Beginning at [fol. 235] a pine in Jones' line, thence off on new line S. 67 E. 450 feet to a rock, thence S. 28¾ E. 965 feet to a road

leading to Woltz's house, thence S. 73/4 E. 1020 feet to a rock in Willingham's line, thence Willingham's line N. 76 E. 2180 feet to a rock on the bluff thence N. 55½ E. 132 feet to a small ash on Dan River, thence by the same course 15 feet to the water's edge, thence up Dan River as it meanders to what was formerly Jones line S. 81½ W. 680 feet to the beginning. 2nd. One acre of land adjoining same conveyed to Banister-Dan Mills Co. by W. H. Jones and others by deed dated Jan. 27, 1899, recorded in the Clerk's Office of Halifax County, in deed book No. 95, page 127 to which reference is hereby made for a more complete description. 3rd. A tract of land on the north side of Dan River opposite the above mentioned tracts being a portion of the tract formerly owned by the said Banister-Dan Mills Co. known as Falkland, containing three hundred and ninety six acres according to survey and plat made by E. R. Farmer D. S. H. C. Oct. 16, 1905, and bounded as follows: Beginning at an elm on the Dan River near the head of the rapids known as Hyco Falls and near the mouth of an old canal, thence N. 27 E. 40 chains to a stone, thence S. 63 E. 103 chains to a stone, thence S. 27 W. 40 chains to an ash on Dan River a short distance below the mouth of Peter's Creek, thence up the river as it meanders N. 57 W. 1.60 chains, N. 70½ W. 6.50 chains, N. 74½ W. 3.37 chains, N. 81⅛ W. 3.57 chains, N. 70¼ W. 4 chains, N. 86 W. 4.42 chains, N. 64½ W. 3.65 chains, N. 33 W. 6.40 chains, N. 25½ W. 3 chains, N. 40¼ W. 3 chains, N. 56¼ W. 3.97 chains, N. 54-58 W. 9.09 chains, N. 55½ W. 8 chains, N. 45 W. 5.10 chains, N. 54¼ W. 5.56 chains, N. 55½ W. 6.22 chains, N. 80¼ W. 1.88 chains, N. 57¼ W. 5.67 chains, N. 52½ W. 4.27 chains, N. 59¾ W. 5.73 chains, N. 89 W. 2.18 chains, S. [fol. 236] 75⅝ W. 2.11 chains, N. 85¾ W. 1.70 chains, S. 81½ W. 3.89 chains, S. 71 W. 2.92 chains, S. 87⅞ W. 2.52 chains to the beginning. 4th. The water rights, water power and water privileges owned by Banister-Dan Mills Co. incident to said land and the privilege to construct dams or other works on said land to raise the water at the head of said Hyco Falls six (6) feet high above the usual water level without requiring compensation for any damages thereby to any land owned by said Banister-Dan Mills Co. on Dan River. Said undivided two thirds interest which is herein conveyed being the same interest in said property herein above described which was conveyed to the said

J. J. Lawson, R. W. Lawson, Joseph Stebbins, R. S. Barbour, and J. A. Mebane by the Banister-Dan Mills Co. by deed bearing date June 26, 1906, and duly recorded in the Clerk's Office of Halifax County. And the said parties of the first part hereby covenant that they are seized in fee simple of the property herein conveyed; that they have the right to convey the same; that they have done no act to encumber it; that said grantee shall have quiet possession thereof, free from all encumbrances, and that they will execute such other and further assurances thereof as may be requisite. Witness the following signatures and seals.

R. W. Lawson, Mary Lawson, J. J. Lawson, Eliza Lawson, Joseph Stebbins, Willie S. Stebbins, R. S. Barbour, Bessie K. Barbour, J. A. Mebane, Susan A. Mebane. (Seal.)

[fol. 237] Virginia,
County of Halifax, to-wit:

I, Joseph Stebbins, Jr., a Commissioner in Chancery of the Circuit Court for the County aforesaid, in the State of Virginia, do hereby certify that J. J. Lawson and Eliza Lawson, his wife, R. W. Lawson and Mary C. Lawson, his wife, Joseph Stebbins and Willie Stebbins, his wife, R. S. Barbour and Bessie K. Barbour, his wife, and J. A. Mebane, and Susan A. Mebane, his wife, whose names are signed to the foregoing writing bearing date on the 1st day of May, 1907, have acknowledged the same before me in my county aforesaid.

Given under my hand, this 10th day of May, 1907.

Joseph Stebbins, Jr., Commissioner in Chancery.

The within written deed was presented in the Clerk's Office of the Circuit Court of Halifax County, Virginia on the 3rd day of June, 1907 and upon the certificate of acknowledgment thereon endorsed admitted to record according to law.

Gran Craddock, Clerk. J. T. Lacy, Clerk.

Test:

[fol. 238] DEFENDANT'S EXHIBIT G.

This deed, made the 19th day of January, 1920, between South Boston Electric Light & Power Company, a corporation created by and existing under the laws of the State of Virginia, party of the first part, and Falkland Estate, Inc., a corporation created by and existing under the laws of the State of Virginia, party of the second part, WITNESSETH: That the said party of the first part for and in consideration of the sum of FIVE THOUSAND SIX HUNDRED AND SEVENTY-SIX DOLLARS cash to it in hand paid, the receipt whereof is hereby acknowledged, doth grant, bargain, sell and convey, with general warranty of title, unto the said Falkland Estate, Inc. the following property, to wit: 1. All that certain tract or parcel of land, situated in Roanoke and Red Bank Districts of Halifax County, Virginia, lying on the north and south sides of Dan River, near Hyco Falls, and embracing the island known as Pollard's Island containing about 50 acres, containing three hundred and forty-eight acres, more or less; it being a part of a certain tract of land heretofore conveyed to the said party of the first part by Banister Dan Mills Co. by deed dated May 1, 1907, recorded in the Clerk's Office of Halifax County in deed book 103, page 181, conveying an undivided one third interest in a tract of 500 acres; and by J. J. Lawson and others by deed dated May 1, 1907, recorded in said office in deed book 103, page 183; the *the* portion of the said tract of 500 acres hereby conveyed being all of the said tract conveyed to the party of the first part by the said deeds from the Banister Dan Mills Co. and J. J. Lawson and others except a tract of 152 acres conveyed by the party of the first part to W. T. Harris by deed dated May 24, 1907, recorded in the Clerk's office of Halifax county in deed book 103, page 168, the boundaries of said tract of 152 acres being given in said deed to W. T. Harris; [fol. 239] and all of the above mentioned deeds are hereby referred to for more particular description of the lands hereby conveyed. 2. All that certain other tract or parcel of land lying in Red Bank District of said Halifax County, on Hyco River, known as Pollard's Mill, and containing ten (10) acres, more or less, together with all improvements thereon and appurtenances thereunto belonging; being the same property conveyed to the party of the first part by

W. B. Settle, Spl. Commr. and others by deed dated May 29, 1919, duly recorded in the Clerk's office of Halifax County. The above conveyances are made to the party of the second part subject to the following reservations: The party of the first part hereby expressly reserves to itself all the water rights, water power and water privileges owned by it and existing in or upon the said lands hereby conveyed, or any of them, or appurtenant thereto or connected therewith, including the right to construct and maintain dam or dams or other works on said lands and to raise the water at the head of Hyco Falls in Dan River six feet above the usual water level without compensation being required for any damages caused thereby to other lands on said river. But it is not intended hereby to abridge or effect the right of the party of the second part or its assigns to *to* [sic] use and operate the mill known as Pollard's Mill and to use the water power therefor, so long as said water power is not affected by the exercise by the party of the first part of the rights owned by it to raise the water level in said river. The party of the first part covenants that it has a right to *to* [sic] convey the aforesaid lands; that it has done no act to encumber the same; that the party of the second part shall have quiet possession of the same free from all encumbrances, and that it will execute such other and further assurances of the title to said land as may be requisite. In testimony whereof, the party of the first part, [fol. 240] the South Boston Electric Light & Power Company, has caused these presents to be signed by Jas. W. Throm, its president, and its corporate seal hereunto affixed and attested by T. K. Singleton, its Secretary, this the day and year first above written

South Boston Electric Light & Power Company.
By James W. Throm, President.

Attest: T. K. Singleton, Secretary.

[fols. 241-243] SOUTH BOSTON ELECTRIC LIGHT & POWER COMPANY, SOUTH BOSTON, VA.

1900

Halifax County, to-wit:

I, W. B. Settle, a Notary Public in and for the county aforesaid, in the State of Virginia, do certify that Jas. W. Throm and T. K. Singleton, whose names as President and Secretary, respectively, of the South Boston Electric Light & Power Company, are signed to the foregoing and annexed deed; bearing date on the 19th day of January, 1920, have acknowledged the same before me in my county aforesaid; and they further made oath that the corporate seal thereto affixed is the true corporate seal of the said corporation, and that it was affixed thereunto by due authority, and that said writing was executed by due authority. Given under my hand this the 19th day of January, 1920.

W. B. Settle.

My Com. expires Apl. 26, 1923.

The within written deed was presented in the Clerk's Office of the Circuit Court of Halifax County, Virginia on the 26 day of Jan. 1920 and upon the certificate of acknowledgment thereon endorsed admitted to record according to law. War stamp attached and cancelled. $6.00.

E[illegible] and mld to P. C. Edmunds, Houston, Va. 2-2-20

J. T. Lang, Clerk.

[fol. 244] IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7882

UNITED STATES OF AMERICA, Appellant

v.

2979.72 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF HALIFAX; VIRGINIA, OLIVE VAUGHAN WILLIAMS, ET AL., AND UNKNOWN OWNERS, Appellees

Appeal from the United States District Court for the Western District of Virginia

Appendix for Virginia Electric and Power Company

EXCERPT FROM COMPLAINT—Filed October 23, 1952

* * * * * * * * *

"6. The persons having or claiming, or who may have or claim an interest in the property, whose names are ascertainable by a reasonably diligent search of the records and those whose names have otherwise been learned are:
[fol. 245] List of Owners and Possible Parties Defendant for each Tract in Condemnation Proceedings entitled U. S. Against 2979.72 Acres of Land in Halifax County, Virginia, ~~Virginia Electric & Power Co.,~~ et al., & Unknown Owners—

John H. Kerr Dam and Reservoir"

* * * * * * * * *

(NOTE: The name of "Virginia Electric & Power Co." has been deleted by a red line.)

[fol. 246] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA AT LYNCHBURG

Civil No. 296

UNITED STATES OF AMERICA, Plaintiff

v.

2979.72 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF HALIFAX, VIRGINIA, OLIVE VAUGHAN WILLIAMS, ET AL, AND UNKNOWN OWNERS, Defendants

NOTICE TO VIRGINIA ELECTRIC AND POWER COMPANY—
Dated October 23, 1952

Tracts Nos. BB-2739, BB-2740, FF-3100E, JJ-3500, JJ-3501, JJ-3502, JJ-3503, JJ-3504, JJ-3505, JJ-3506, JJ-3507, JJ-3508, JJ-3509, JJ-3510, JJ-3511, JJ-3512, JJ-3513, JJ-3514, JJ-3515, JJ-3516, JJ-3517, JJ-3518, JJ-3519, JJ-3520, JJ-3521, JJ-3522, JJ-3523, JJ-3524, JJ-3525, JJ-3528, JJ-3529, JJ-3530, JJ-3531, JJ-3534, JJ-3535, JJ-3537.

To: Commonwealth of Virginia; c/o Attorney General, Richmond, Virginia; Virginia Electric & Power Company, Richmond, Virginia.

You are hereby notified that a Complaint in condemnation has heretofore been filed in the office of the Clerk of the United States District Court for the Western District of [fol. 247] Virginia, at Lynchburg, Virginia, for the taking of property, hereinafter described, in which you have or claim, or may have or claim an interest.

The authority for the taking is stated in Exhibit "A" hereto attached and made a part hereof.

The uses for which the property is to be taken are stated in Exhibit "B" hereto attached and made a part hereof.

The interest or estate to be acquired in the property in this proceeding is stated in Exhibit "C" hereto attached and made a part hereof.

The property so to be taken, in which you have or claim or may have or claim an interest, is described in Exhibit "D" hereto attached and made a part hereof.

You are further notified that, if you have any objection or defense to the taking of your property, you are required to serve upon plaintiff's attorney at the address herein designated within twenty days after personal service of this notice upon you, exclusive of the day of service, an answer identifying the property in which you claim to have an interest, stating the nature and extent of the interest claimed and stating all your objections and defenses to the taking of your property. A failure so to serve an answer shall constitute a consent to the taking and to the authority of the court to proceed to hear the action and to fix the just compensation and shall constitute a waiver of all defenses and objections not so presented.

You are further notified that, if you have no objection or defense to the taking, you may serve upon plaintiff's attorney a notice of appearance designating the property in which you claim to be interested, and thereafter you shall receive notice of all proceedings affecting the said property.

You are further notified that at the trial of the issue of just compensation, whether or not you have answered or [fol. 248] served a notice of appearance, you may present evidence as to the amount of the compensation to be paid for the property in which you have any interest and you may share in the distribution of the award of compensation

Howard C. Gilmer, Jr., United States Attorney.
By (S.) W. O. Chatterton, Special Attorney, Department of Justice.

Dated October 23, 1952

Demand for Jury Trial

Trial by jury of the issue of just compensation in this case is demanded by the plaintiff.

Howard C. Gilmer, Jr., United States Attorney.
By (S.) W. O. Chatterton, Special Attorney, Department of Justice, Attorney for the plaintiff.

Address of the Attorney for the plaintiff: 205 Federal Building, Lynchburg, Virginia.

[fol. 249] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEARANCE OF DEFENDANT VIRGINIA ELECTRIC AND POWER COMPANY—Filed November 15, 1952

Notice is hereby given of the appearance of the defendant Virginia Electric and Power Company, in the above styled action.

Virginia Electric and Power Company designates the following properties in which it claims to be interested by the tract numbers assigned in the notice of condemnation and exhibits attached thereto:

Tracts Nos.: BB-2739, BB-2740, FF-3100E, JJ-3500, JJ-3501, JJ-3502, JJ-3503, JJ-3504, JJ-3505, JJ-3506, JJ-3507, JJ-3508, JJ-3509, JJ-3510, JJ-3511, JJ-3512, JJ-3513, JJ-3514, JJ-3515, JJ-3516, JJ-3517, JJ-3518, JJ-3519, JJ-3520, JJ-3521, JJ-3522, JJ-3523, JJ-3524, JJ-3525, JJ-3528, JJ-3529, JJ-3530, JJ-3531, JJ-3534, JJ-3535, JJ-3537.

It is requested that the defendant, Virginia Electric and Power Company, be given proper notice of all proceedings which may affect said properties.

The right to contest the issue of just compensation and to appear and present evidence of value of the aforesaid properties and of this defendant's interests therein at the trial of such issue is hereby expressly reserved.

Virginia Electric and Power Company, By (S.)
T. Justin Moore, Counsel

T. Justin Moore, 1003 Electric Building, Richmond, Virginia.

[fol. 250] Ralph H. Ferrell, Jr., 1003 Electric Building, Richmond, Virginia.

F. V. Lowden, Jr., 1003 Electric Building, Richmond, Virginia.

Counsel for Defendant, Virginia Electric and Power Company.

CERTIFICATE OF SERVICE (omitted in printing)

IN UNITED STATES DISTRICT COURT

MOTION FOR JUDGMENT BY UNITED STATES—Filed July 2, 1953.

Now comes plaintiff United States of America and respectfully shows the Court:

. . . . . .

6. No contention of the existence of any such claim of flowage, water and other power rights and easements arises in this cause except through the claim filed herein by the Virginia Electric and Power Company. As more specifically appears from the records of this Court in this cause, that Company has filed notice of appearance in which it claims to be interested in each and every tract involved [fol. 251] in this proceeding, requests notice of all further proceedings, and reserves the right to contest the issue of just compensation.

7. This claim of the Power Company is blocking the settlement of the tracts herein set out and of at least ten other tracts in the "JJ" segment or series of this proceeding and, as appears from the records of this Court, it has prevented and is preventing complete distribution of the estimated just compensation deposited with the declaration of taking herein. The Power Company should be required to appear and show the basis, validity and extent of its claim of interest.

8. Insofar as plaintiff has been able to discover with due diligence the facts pertinent to the claim of the Power Company relating to the "JJ" segment or series of tracts involved in this proceeding are matters of record and common knowledge beyond the possibility of dispute and are as follows:

(a) Virginia Electric and Power Company derived title through the South Boston Electric Light and Power Company under the following instruments: Deed dated October 14, 1920, from *South Boston Electric Light and Power Company*, to the *South Boston Power Company, Inc.*, recorded in Deed Book 127, page 233, Halifax County; Deed dated September 28, 1921, from *South Boston Power Company*, a corporation, etc., to the *Halifax Power Company*,

recorded in Deed Book 129, page 96, Halifax County; Deed dated October 6, 1925, from *Halifax Power Company* to *Middle Virginia Power Company*, recorded in Deed Book 136, page 225, Halifax County; Deed dated June 8, 1942, from *Middle Virginia Power Company* to *Virginia Public Service Company*, recorded in Deed Book 164, page 557, Halifax [fol. 252] County, and by the merger of *Virginia Public Service Company* into *Virginia Electric and Power Company*, Office of the State Corporation Commission, City of Richmond, May 26, 1944.

. . . . . .

This motion, duly verified, is asked to be considered and used as an affidavit and is based on the facts herein stated and the memorandum of authorities hereto attached.

Wherefor plaintiff prays: That this motion be set for hearing upon due notice to Virginia Electric and Power Company and all other interested parties and, in the absence of a showing of due cause to the contrary, for the orders and judgments of the Court in accordance with this motion and affidavit and the stipulations herewith filed.

Howard C. Gilmer, Jr., United States Attorney. By (S.) Murray A. Foster, Special Assistant to the United States Attorney. (S.) W. Braxton Miller, Attorney, Department of Justice.

Duly sworn to by W. Braxton Miller. Jurat omitted in printing.

[fol. 253] CERTIFICATE OF SERVICE BY MAILING (omitted in printing)

[fol. 254] IN UNITED STATES DISTRICT COURT

ANSWER OF THE DEFENDANT VIRGINIA ELECTRIC AND POWER COMPANY TO PLAINTIFF'S MOTION FOR JUDGMENT Filed July 24, 1953

First Defense

(1) The allegations of fact in Paragraphs 1, 2, 3, 4, 5 and 6 are admitted except the statement in Paragraph 6 to the effect that no valid or existing flowage, water, dam, pondage, and power rights or easements exist on or against the two tracts of land referred to in the Plaintiff's Motion for Judgment and other papers filed herein as Tracts Nos. JJ 3524, A and B, and JJ 3525; and further answering says that it claims such rights under the agreement dated December 24, 1913, between Joseph Stebbins, Jr., Special Commissioner, and South Boston Electric Light and Power Company, recorded in Deed Book 113, page 291, in the Clerk's Office of the Circuit Court of Halifax County, a photostat copy of which is attached hereto marked "Exhibit A."

[fol. 255] (2) Answering Paragraph 7, this Defendant says that it does not wish to block settlement of "estimated just compensation," or the complete distribution thereof to those properly entitled thereto, for the aforesaid Tracts Nos. JJ 3524, A and B, and JJ 3525; and further answering says that this Defendant does not wish to block settlement of estimated just compensation or complete distribution thereof to those properly entitled thereto for the "at least ten other tracts in the 'JJ' segment or series of this proceedings" as alleged by Plaintiff, and hereby requests that this Defendant be permitted to appear and show the basis, validity and extent of its claims, and the value thereof, in all such tracts of land in which this Defendant has compensable interests, including the ten or more tracts referred to above as well as the two Tracts Nos. JJ 3524, A and B, and JJ 3525.

(3) The allegations of fact in Paragraph 8 in so far as they relate to water and floodage rights are true, but the fee simple title to the 3.35 acre tract, designated as Tract No. JJ 3535, A, and the one acre tract, designated as Tract No. JJ 3537 B, were not acquired as indicated in Plaintiff's Motion for Judgment under the deed from Middle Virginia

Power Company to Virginia Public Service Company, dated June 8, 1942, (a photostatic copy of which is attached hereto marked "Exhibit B"), but the fee simple title to said tracts was acquired by this Defendant from Halifax Power Company in the following manner:

(a) Halifax Power Company and Emporia Hydro Electric Power Corporation merged on October 12, 1925, to form the Southside Virginia Power Company.

(b) Southside Virginia Power Company (old) and Piedmont Power Company merged by agreement dated [fol. 256] January 26, 1926, to form the new Southside Virginia Power Company.

(c) Southside Virginia Power Company, Alexandria Light and Power Company, Virginia Northern Power Company, and Virginia Western Power Company merged into Virginia Public Service Company on February 28, 1926.

(d) Virginia Public Service Company merged into Virginia Electric and Power Company on May 26, 1944.

(4) The allegations of fact in Paragraphs 9, 10 and 11 are true except that the date of the deed from Malcolm G. Bruce, et al, mentioned in Paragraph 10 as "dated July 23, 1907," is dated July 26, 1907.

(5) The allegations of fact in Paragraph 12 are admitted, but the legal conclusions stated therein are denied.

Second Defense

This Defendant owns the fee simple title to the parcel of land on the south side of the Dan River, containing 3.35 acres, designated in this proceeding as Tract No. JJ 3537 A, and claims that regardless of whether this Defendant's rights in the one acre tract of Bruce lands on the north side of the Dan River, referred to in this proceeding as Tract No. JJ 3537 B, which was condemned under the Mill Dam Act (Virginia Code 1887, Sections 1347-60; Code of Virginia, 1950, Section 62-104) have reverted due to non-user [sic], that all of its flowage easements and riparian rights over the lands otherwise acquired in connection with the dam across the Dan River were not thereby released or have ceased to exist, but, on the other hand, that this Defendant

[fol. 257] continues to hold such rights for which it is entitled to just compensation.

Third Defense

(1) This Defendant claims that it owns riparian, water and floodage rights upon approximately 6,000 acres of the land designated in this proceeding as Tract No. FF 3100 E, by virtue of (a) the deed from Falkland Estate, Incorporated, to Middle Virginia Power Company, dated October 14, 1925, recorded in Deed Book 136, page 227, in the Clerk's Office of the Circuit Court of Halifax County; a photostat copy of said deed is attached hereto marked "Exhibit C"; and (b) the deed from Hannah N. Vaughan to Middle Virginia Power Company, dated January 3, 1942, recorded in Deed Book 164, page 84, in the Clerk's Office of the Circuit Court of Halifax County, a photostat copy of which is attached hereto marked "Exhibit D"; and that the aforementioned riparian, water and floodage rights were acquired by this Defendant in the following manner:

(a) By deed from Middle Virginia Power Company to Virginia Public Service Company, dated June 8, 1942, recorded in Deed Book 164, page 557, in the Clerk's Office of the Circuit Court of Halifax County and in Deed Book 190, page 73, in the Clerk's Office of the Circuit Court of Campbell County; and

(b) Virginia Public Service Company merged into Virginia Electric and Power Company on May 26, 1944.

(2)(A) This Defendant also claims that it owns riparian, water and floodage rights upon certain tracts of land known as the "Hyco Falls property," referred to in this [fol. 258] proceeding as the "BB" segment or series, and specifically Tract No. BB 2739; which riparian water and floodage rights were acquired by South Boston Electric Light and Power Company (a) by deed from Bannister Dan Mills Company, dated May 1, 1907, recorded in Deed Book 103, page 181, in the Clerk's Office of the Circuit Court of Halifax County, a photostat copy of which is attached hereto marked "Exhibit E"; (b) by deed from J. J. Lawson, et al, dated May 1, 1907, recorded in Deed Book 103, page 183, in the Clerk's Office of the Circuit

Court of Halifax County, a photostat copy of an attested copy of said deed is attached hereto marked "Exhibit F"; and (c) were reserved by South Boston Electric Light and Power Company in its deed to Falklaind Estate, Incorporated, dated January 19, 1920, recorded in Deed Book 125, page 378, in the Clerk's Office of the Circuit Court of Halifax County; and which riparian, water and floodage rights of South Boston Electric Light and Power Company were subsequently acquired by this Defendant in the manner set forth in Paragraph 8, Section (a) of the Plaintiff's Motion for Judgment.

(B) This Defendant does not believe that it has any riparian, water or floodage rights upon the tract of land designated in these proceedings as Tract No. BB 2740.

(3) In order to dispose of all the claims of this Defendant, which are involved in this proceeding, in a prompt, orderly and efficient manner, this Defendant, because of the character, location and quantity of the property condemned, the legal issues involved, and the complexity of valuing the interest of this Defendant therein, prays, pursuant to Rule 71 A(h), that a commission of three persons be appointed by the Court to make such determination [fol. 259] for its interests in the lands enumerated below and that all former owners thereof, defendants herein, be duly convened:

Tracts Nos.: BB-2739, EF-3100E

. . . . . .

Virginia Electric and Power Company, By (S.) Ralph H. Ferrell, Jr., Counsel.

T. Justin Moore, Ralph H. Ferrell, Jr., Frances [sic] V. Lowden, Jr., Hunton, Williams, Anderson, Gay & Moore, 1003 Electric Building, Richmond, Virginia, Of Counsel.

Duly sworn to by F. W. Collins. Jurat omitted in printing.

[fol. 260] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 261] IN UNITED STATES DISTRICT COURT

AMENDMENT TO PLAINTIFF'S MOTION FOR JUDGMENT Filed August 13, 1953

Now comes plaintiff United States of America and amends its motion for judgment heretofore filed in this Court, in the light of the answer of defendant Virginia Electric and Power Company thereto, as follows:

* * * * * * *

8. With respect to the Third Defense of defendant's answer to motion for judgment, plaintiff says that the FF and BB Segments of the John H. Kerr Dam and Reservoir Project, and Tracts Nos. FF-3100E and BB-2739, lie well over six miles down the river from the JJ Segment involved in plaintiff's motion for judgment, and the claimed rights therein stem from an entirely different source of title as therein said Third Defense appears. Judgment with respect to the 33 tracts of land involved in the JJ Segment should be without prejudice to the rights of parties plaintiff and defendant as to tracts lying in the FF and BB Segments, and those matters should be set down for a separate hearing and pre-trial conference, at which many of the material facts should be agreed upon and the contentions of the parties and the issues involved determined.

Wherefore, plaintiff renews its motion for final judgment as to Tracts Nos. JJ-3524A and B and JJ-3525, and a final determination of the rights of defendant Virginia Electric and Power Company as to all of the tracts involved in the JJ Segment of this proceeding.

(S.) John Strickler, United States Attorney.

[fol. 262] By (S.) Murray A. Foster, Special Assistant to the United States Attorney.

(S.) W. Braxton Miller, Attorney, Department of Justice, Washington 25, D. C.

Duly sworn to by W. Braxton Miller. Jurat omitted in printing.

[fol. 263] CERTIFICATE OF SERVICE BY MAILING (omitted in printing)

[fol. 264] IN UNITED STATES DISTRICT COURT

INTERROGATORIES ADDRESSED BY DEFENDANT VIRGINIA ELECTRIC AND POWER COMPANY TO PLAINTIFF, UNITED STATES OF AMERICA — Filed October 28, 1953

The Plaintiff, United States of America, is requested to answer the following interrogatories in accordance with Rule 33 of the Federal Rules of Civil Procedure:

1. (a) How many acres are there in Tract No. BB-2739, which are taken in this proceeding?

(b) Do you concede that Virginia Electric and Power Company has the right to flood all the acreage mentioned in your answer to (a)?

(c) If not, how many of such acres do you concede Virginia Electric and Power Company has the right to flood?

(d) What is your estimate of the fair market value of Tract BB-2739 and what have you paid into the Court for this tract?

2. (a) How many acres are there in Tract No. FF-3100E which are affected by the rights taken in this proceeding?

(b) Do you concede that Virginia Electric and Power Company has the right to flood all of the acreage mentioned in your answer to (a)?

(c) If not, how many of such acres do you concede Virginina Electric and Power Company has the right to flood?

3. (a) Do you concede that the extent of the rights taken by the United States in its Declaration of Taking with respect to Tract FF-3100E is the equivalent, from the standpoint of value, of taking the fee simple title of land?

[fol. 265] (b) If not, what percentage, if any, of the fee value of land do you concede should be paid by the United States as compensation for rights such as those taken in the Declaration of Taking with respect to Tract FF-3100E?

4. (a) Do you concede that Tract FF-3100E as a whole has any value?

(b) If so, what is your estimate of the value per acre for the highest purpose to which such land may be put?

5. (a) As directed by U. S. Code Title 40 § 258, have you paid into court your estimated fair compensation for the taking affecting Tract FF-3100E?

(b) If not, do you intend to do so?

6. (a) Do you concede that you paid Mrs. Olive Vaughan Williams only $1.00 as consideration for her conveyance to the United States of the right to flood the acres mentioned in your answer to question 2(a)?

(b) Do you concede that the negotiations with Mrs. Olive Vaughan Williams were predicated upon the basis that Virginia Electric and Power Company already had floodage rights on such land, or a large part thereof, and therefore Mrs. Olive Vaughan Williams did not have power to effectively grant floodage rights to the United States?

(c) If you do not so concede, please state the basis for the agreement between the United States and Mrs. Olive Vaughan Williams.

(d) Please furnish copies of all correspondence between the United States or its representatives and Mrs. Olive Vaughan Williams or her representatives and copies of any agreements reached or conveyances to the United States affecting or concerning Tract FF-3100E.

[fol. 266] (e) Do you concede that Mrs. Olive Vaughan Williams could not, as a matter of law, effectively grant to the United States floodage rights on lands which Virginia Electric and Power Company already had the right to flood?

7. What height is the normal water level of the Dan River at South Boston?

8. To what elevation do you concede Virginia Electric and Power Company had the right to build a dam at Hyco Falls under the conveyances affecting the "Falkland Estate"?

9. Do you concede that Virginia Electric and Power Company has the right to flood Tracts Nos. JJ-3528, 3507, 3508, 3509, 3514, 3515, 3516, 3517, 3529 and 3531 at least to a height of 8 feet above the normal water level at the South Boston dam site?

Virginia Electric and Power Company, By (S.) Francis V. Lowden, Jr., Counsel

In United States District Court

Answers to Interrogatories Addressed by Defendant, Virginia Electric and Power Company to Plaintiff, United States of America —Filed November 12, 1953

Now comes W. Braxton Miller, attorney, Department of Justice, and as such, responds to the interrogatories filed and served by defendant, Virginia Electric and Power Company, as follows:

[fol. 267] 1. (a) There are 33.3 acres in Tract BB-2739, which are being acquired in fee in this proceeding, and this is a part of a larger parcel formerly held under the same ownership in the approximate amount of 56.9 acres, all of which more specifically appears from a sketch of said tract dated December 5, 1950, a copy of which is enclosed herewith as Exhibit "A" to these answers.

(b) No.

(c) Plaintiff is in no position to make such a concession at this time. The number of acres will depend upon a construction of the deeds under which you claim, whether such rights are valid and subsisting, the location of any dam or dams you planned or intended to construct, if any, and upon surveys which plaintiff has not made. It may be possible to answer this question more specifically after seeing and obtaining a copy of the engineering studies referred to in your answer (5)(c) to the interrogatories filed by this plaintiff.

(d) In accordance with 40 U. S. C. A. sec. 258a, the just compensation for the taking of Tract BB-2739 was estimated at $1,300.00 and the same was deposited into the registry of this Court, which estimate is not binding on this plaintiff nor any other party to this proceeding.

2. (a) There are 1,840 acres in Tract FF-3109E over which a flowage easement is being imposed under the declaration of taking filed herein, and this is a part of a larger single parcel of land held in one ownership containing a total acreage of 7,405.35 acres. This more specifically appears from a tract sketch thereof, dated January 15, 1951, a copy of which is enclosed herewith as Exhibit "B" to these answers.

(b) No.

(c) The answer to this question is identically the same [fol. 268] as that hereinbefore made with respect to Tract

BB-2739 under answer numbered 1(c), reference to which is hereby made.

3. (a) No.

(b) As appears hereafter, this has not been placed at issue in this cause, but counsel for plaintiff considers that it is not a matter of percentage but the effect of the imposition of the easement across Tract FF-3100E upon the entire tract of which it is a part.

4. (a) Tract FF-3100E, as a whole and as a part of the larger parcel of 7,405.35 acres of which it is a part, would certainly have value.

(b) As appears hereafter, this has not been placed in issue in this case and is not estimated except as hereafter set out.

5. (a) In accordance with 40 U. S. C. A. sec. 258a, the just compensation for the taking of the flowage easement over Tract FF-3100E was estimated at $1.00, which estimate, in itself, is neither binding on this plaintiff nor any party hereto, and this amount was deposited in court with the declaration of taking on file in this case.

(b) See above.

6. (a) As hereafter more specifically set out, Mrs. Olive Vaughan Williams consented to accept $1.00 for the easement imposed over her land, and said amount has been deposited into the registry of the court.

(b) No.

(c) and (d) The only basis, negotiation or correspondence between this plaintiff and Mrs. Olive Vaughan Williams with respect to Tract FF-3100E in any way binding [fol. 269] upon this plaintiff is as follows: On April 30, 1951, Olive Vaughan Williams executed an option to this plaintiff for a flowage easement over Tract FF-3100E for the sum of $1.00; under authority of this plaintiff this option was accepted on May 31, 1951; thereafter, in accordance with paragraph (6) of said option and 40 U. S. C. A. sec. 258a of the Declaration of Taking Act, it was elected to acquire said rights or easements by condemnation, the declaration of taking was filed and the deposit of $1.00 was made as above set out, and thereafter this plaintiff and defendant, Olive Vaughan Williams, entered into a stipulation to limit the interest taken to the exact language and understanding of the parties with respect thereto, which was filed in this Court on July 31, 1953. A photo-

static copy of the option is attached hereto as Exhibit "C" to these answers, and a carbon copy of the stipulation is attached hereto as Exhibit "D" to these answers.

(c) No. The conflict, if any, between the flowage easements would appear to be a matter of fact and law.

7. In response to this question there is forwarded herewith as Exhibit "E" to these answers, a profile map of the Roanoke and Dan Rivers, carrying U. S. Engineers File No. GG 151A-1, Plate 3, dated November 1945. This places the low water level of the Dan River at South Boston at approximately 302 feet mean sea level elevation. During the time gage readings were kept (1900-1907, 1923-1952) the maximum gage reading was 31.8 feet (331.93 ft. msl) and the minimum reading was 3.11 feet (302.34 ft. msl). The station was discontinued September 30, 1952. Prior to that the maximum reading was 24.12 feet (323.35 ft. msl) on March 26, 1952, and the minimum 4.44 feet (303.67 ft. msl) on October 7, 1951. The gage readings [fol. 270] are a matter of public record and further details will be furnished on informal request in response to specific questions as to dates or flood stages.

8. As heretofore stated, this plaintiff is not in a position to concede that you have valid and existing rights to build any dam at Hyco Falls. However, as counsel for plaintiff understands the deeds upon which you rely, the right was conveyed to your predecessors in title to build any dam at Hyco Falls so that the normal water level behind said dam would not be higher than 8 feet. The elevation would depend upon the point or points at which you had planned or intended to construct such a dam, if any.

9. No. Plaintiff's contentions as to your flowage easements over tracts in the "JJ" segment are as set out in its motion for judgment and amended motion for judgment heretofore filed in this cause.

(S.) W. Braxton Miller, Attorney, Department of Justice, Washington 25, D. C.

IN UNITED STATES DISTRICT COURT

MOTION BY PLAINTIFF FOR PRE-TRIAL CONFERENCE—Filed November 30, 1953

Plaintiff moves for a pre-trial conference to settle issues and avoid unnecessary proof as to the claims of defendant Virginia Electric and Power Company and, to that end, plaintiff respectfully shows the court:

[fol. 271] 1

Under the facts and circumstances of this case the primary and controlling issues are: First, whether the Dan River is an interstate navigable stream. Second, whether dam, flowage and other rights, easements and privileges, directly related to and dependent on the flow and water power of an interstate navigable river are compensable private property in a condemnation proceeding by the United States for the benefit of navigation and flood control.

The rights to dam, flowage easements and other privileges claimed by the power company in connection therewith can have value only for dam and water power purposes. Defendant in its answers to interrogatories submited by plaintiff claims value for no other purpose. The taking in this case is authorized primarily for the benefit of navigation and for flood control under the authorizing act of December 22, 1944; 58 Stat. 887, sec. 10, 891, 894. For the purpose of showing that the Dan River is an interstate navigable stream as a matter of law, plaintiff offers in evidence and to the judicial notice of the court the following public acts and records:

Acts of Congress

Acts of Congress making appropriations for improving navigation on the Dan River between Madison, North Carolina, and Danville, Virginia, 21 Stat. 191 and 474; 22 Stat. 199; 23 Stat. 139; 24 Stat. 319. Acts of Congress approving dams and bridges across the Dan River in accordance with acts relating to navigable waters, 61 Stat. 98; 49 Stat. 27; 48 Stat. 96; 45 Stat. 1159.

[fol. 272] Acts of General Assembly of Commonwealth of Virginia

Act of December 10, 1814, Va. Laws, 1814-1815, c. L, p. 110, declaring Dan River from its confluence with the Staunton River to the first intersection with the North Carolina line a public highway. Act of February 19, 1816, Va. Laws, 1815-1816, c. L, pp. 73-82, incorporating a company for purpose of improving the navigation of the Roanoke River and its branches. Act of January 15, 1817, Va. Laws, 1816-1817, c. 41, pp. 73-82, amending preceding Act and the charter of Roanoke Navigation Company. Act of February 19, 1818, Va. Laws, 1817-1818, c. LXIII, pp. 111-112, providing that whereas North Carolina had enacted required legislation, the Board of Public Works was directed to subscribe $80,000.00 to stock of Roanoke Navigation Company. Act of March 21, 1836, Va. Laws, 1835-1836, c. 73, pp. 49-50, regulating conduct of boatmen on the Appomattox and Roanoke Rivers and their branches. Resolution of March 23, 1837, Va. Laws, 1836-1837, p. 97, authorizing the Board of Public Works to survey Dan River from its confluence with the Staunton River to the Town of Danville, and the Staunton River from its confluence with the Dan River to the Town of Brookneal, and the Roanoke River above Rock Landing for susceptibility to steamboat navigation. Act of April 4, 1838, Va. Laws, 1838, c. 202, pp. 145-148, authorizing Roanoke Navigation Company to increase capital stock and, if increased, requiring Company to improve Staunton River to Brookneal, and Dan River to Danville, for steamboat navigation and reserving the right to require further improvement up the Dan and Staunton Rivers if the wants of the country should require it. Va. Laws, 1852, c. 231, pp. 161-162, reciting that whereas North Carolina has authorized the Roanoke Navigation Company to become a common [fol. 273] carrier of freight on the Roanoke, Dan and Staunton Rivers in that state, the Company is authorized to run boats for the carriage of freight of all sorts on those rivers in Virginia (North Carolina Laws, 1848-1849, Act of January 27, 1849, c. LXIX, p. 119). The Va. Laws, 1876-1877, p. 328, 1877-1878, p. 25, and 1881-1882, p. 80, reflect the demise of the Roanoke Navigation Company.

Photostatic Copies of Following Public Records Filed Herewith as Exhibit "A" to This Motion

1. The official report of the Division Engineer, South Atlantic Division, to the Chief of Engineers, United States Army, relating to the navigability of the Roanoke-Staunton-Dan River System above Weldon, North Carolina, dated September 15, 1931, with Appendix III thereto containing detailed data relating to the Dan River, Va.-N. C., and the ruling of the Chief of Engineers thereon that the head of navigation on the Dan River is at Madison, North Carolina, dated September 24, 1931;

2. Mile by mile report on navigability of the Dan River in the Eighth Annual Report of Board of Public Works to General Assembly of Virginia, 1823, pp. 80-98;

3. Reports of Roanoke Navigation Company contained in: Eleventh Annual Report—Board of Public Works to General Assembly of Virginia, 1827, pp. 43-44; Twenty-eighth Annual Report, 1843, pp. 25-29; Thirty-fourth Annual Report, 1948, pp. 206-210; Thirty-eighth Annual Report, 1853-1854, pp. 641-644; and Report of Roanoke Navigation Company contained in the Annual Reports of the Internal Improvement Companies of the State of Virginia to the Board of Public Works for the year 1876, pp. 173-174.

Defendant, power company, should be required to check [fol. 274] the matters of public record hereinabove cited and furnished and be prepared to stipulate thereto at pre-trial conference.

II

Subject to the court's ruling on theh above isshes, the next issue which should be taken up is: Whether, at time of taking, defendant held an integrated water power site or sites or substantial portions thereof.

In that regard, the pleadings and answers to interrogatories in this case show that the following matters should be presented on stipulation:

1(a). Subject to taxes for the year 1932, and deeds of trust to New York Trust Company, trustee, and Chase National Bank of the City of New York, trustee, defendant power company owned in fee the tract of 3.35 acres of land lying on the south side of the Dan River and now

described and platted in this proceeding as Tract No. JJ-3537A.

(b). Under the Virginia Statute relating to mills and other works on watercourses, Virginia Code, 1887, secs. 1347-60, defendant's predecessors in title condemned a one-acre tract on the north side of the Dan River for an abutment for a dam eight feet high above the usual water level, and this tract is now platted and described in this proceeding as Tract No. JJ-3537B. The order of allotment or condemnation of this tract appears in Order Book 11, page 425, Records of the Circuit Court of Halifax County under date of Saturday, July 29, 1899, an agreed copy of which has already been filed in this proceeding and should be attached to the stipulation.

(c). As appears from the official tract map of the "JJ" segment of this proceeding, a copy of which should be [fol. 275] attached to the stipulation, Tract JJ-3537B is on the north side of the Dan River directly opposite to Tract JJ-3537A. Defendant power company's predecessors in title actually constructed a dam across the river between the two tracts between the years 1899 and 1905.

(d). Thereafter, between the years 1903 and 1913, defendant's predecessor in title, South Boston Electric Light and Power Company, acquired rights to flood certain lands located through the tracts herein platted in the "JJ" segment or series of this proceeding in connection with the dam eight feet in height, constructed across the Dan River, between Tracts JJ-3537A and B, by virtue of release deeds to it as follows: From Royal R. Scott, et al., by deed dated February 28, 1905; from Eliza M. Yates, et al., by deed dated August 4, 1906; from Elizabeth Gray, et al., by deed dated May 6, 1903; from Malcolm G. Bruce, et al., by deed dated July 26, 1907; and from Joseph Stebbins, Jr., Special Commissioner, et al., by deed dated December 24, 1913, all of which deeds have been heretofore more particularly described and agreed photostatic copies thereof filed in this cause.

(e). Thereafter, said dam was destroyed by flood or otherwise became unfit for use long prior to the taking in this proceeding and so continued out of repair and existence until the date of the institution of this cause on October 23, 1952. The exact year when it became unfit for use as aforesaid is unknown, but to the best of defendant power com-

pany's information and belief it was about the year 1927, and plaintiff accepts that date.

(f). When said dam was completed, between the years 1899 and 1905, and for some years thereafter, it was used to supply electricity to the Town of South Boston. At the present time, the Town of South Boston and the surround-
[fol. 276] ing area are supplied with electric power from the sources listed by the defendant in answer to plaintiff's interrogatories number 15 and 16.

2(a). There are 33.3 acres in Tract BB-2739 which are being acquired in fee in this proceeding and this is a part of a larger parcel of 56.9 acres, formerly owned successively by Olive Vaughan Williams, Hannah N. Vaughan and Falkland Estate, Inc. There are 1,840 acres in Tract FF-310E over which a flowage easement is being imposed in this proceeding and this is a part of a larger single parcel of land of 7,405.35 acres now owned by Olive Vaughan Williams and formerly owned by Hannah N. Vaughan and Falkland Estate, Inc., successively.

Plats of both of these tracts and the parcels of land out of which they come have been heretofore furnished to the defendant and should be attached to the proposed stipulation. *In the deeds hereafter referred to, the entire tracts* or parcels of land *out of which Tracts BB-2739 and FF-310E are taken* were estimated to contain *6.199 acres, but the variance or increase in acreage is not material to this proceeding.*

(b). *Defendant's predecessors in title acquired rights in and over the parcels of land of which Tracts Nos. FF-310E* and BB-2739 *are a part*, under deeds from Banister-Dam [sic] Mills Co., dated May 1, 1907, a true photostatic copy of which has been filed in this proceeding as defendant's exhibit E, and from J. J. Lawson, et al., dated May 1, 1907, defendant's exhibit F, both deeds being to South Boston Electric Light and Power Company and as reserved by that company in its deed to Falkland Estate, Inc., dated January 19, 1920, defendant's exhibit G, *all of which rights were as follows:*

[fol. 277] *Water rights, water power and water privileges, including the right to construct and maintain a dam or dams or other works on said land and to raise*

the water at the head of Hyco Falls in the Dan River six feet above the usual water level without compensation for damages caused thereby.

(c). Defendant's predecessors in title *also acquired rights in the entire parcels of land of which Tracts Nos. FF-3100E* and BB-2739 *are a part, as described in the deed from Falkland Estate, Inc., of October 14, 1925,* a true photostatic copy of which has been filed in this cause as defendant's exhibit C, as corrected by the deed from Hannah N. Vaughan of January 3, 1942, defendant's exhibit D. *These rights are as follows:*

> The right to build and rebuild any dam or dams across the Dan River at any point or points desired so that the normal water level behind said dam or dams shall not be higher than the extreme height to which the Middle Virginia Power Company acquired the right to elevate the waters of the Dan River in the deed to it by Halifax Power Company and related deeds; with all riparian rights, water rights, easements and rights of floodage to the fullest extent of said maximum normal water level so far as it affects the property of Falkland Estate, Inc.; also, the right in perpetuity, free of charges, to abut dams, build power houses, use adjoining lands for construction purposes, and to take sand, gravel, stone, or other construction material for such purposes with all necessary rights of way for ingress and egress; the right to establish rights of way for [fol. 278] transmission and telephone lines, 100 feet in width, upon paying therefor $20.00 per acre, and the right to occupy and use lands contiguous to dam abutments and power houses for dwellings and outbuildings for operatives of the plant or plants upon payment of $40.00 per acre.

(d). The provision in the above set out rights, limiting "the normal water level behind said dam or dams," to be no higher than the extreme height to which Middle Virginia Power Company had the right to elevate the waters of the Dan River under the deed from Halifax Power Company, had reference to the rights to dam and dams formerly exist-

ing on the Dan River at a place known as Rogers Island, several miles upstream from the Town of South Boston and upstream from the "JJ" segment as platted in this proceeding. These rights were to maintain a dam from the north bank of the river to Rogers Island to elevate the water to a height of six and one-half feet above the usual water level and to maintain a dam from Rogers Island to the south bank of the Dan River to elevate said water to a height of eight feet above the usual water level.

(c). Under this limitation, plaintiff contends that the right to build and rebuild dams across the Dan River under the Falkland Estate and Hannah N. Vaughan deeds was confined to dams which would not raise the water level more than eight feet immediately behind said dam or dams.

Defendant contends that the deed should be so construed as to grant the right to build dams on or affecting the Falkland or Vaughan Estate properties which would raise the water level of the Dan River to a height of eight feet above the usual water level at Rogers Island.

[fol. 279] *This should be submitted to the court for construction. Until determined, the claimed rights cannot be properly surveyed, platted or evaluated.*

3. The dams and dam rights at Rogers Island are upstream from any lands involved in this proceeding, the dams have long since been out of existence and said dam and dam rights are not material to this proceeding except to determine the height to which defendant's predecessors had the right to dam in connection with the lands involved in Tracts FF-3100E and BB-2739.

4. *The foregoing lands, dam, flowage, water and power rights are all of those known to plaintiff as being owned or claimed by Virginia Electric and Power Company. If defendant has any other lands, rights or easements, which it claims are in any way related to the above holdings, it should make them known or stipulate that there are none.*

Until all of these matters are determined it is impossible to survey, plat and evaluate the rights claimed by defendant power company.

III

The third general issue is: Whether there was a reasonable probability of combining defendant's holdings with other lands for use for power purposes.

1. In its answers to plaintiff's interrogatories, defendant concedes that no construction was ever begun (Ans. 3) and that the rights claimed in connection with Tracts FF-3100E and BB-2739 do not constitute an integrated dam or power site (Ans. 4). It does contend that such rights had value for dam and water power purposes and that it has plans and engineering studies upon which it relies. (Ans. 5 (a)-(c)):

[fol. 280] 2. Plaintiff has not received said plans for particular study, but it appears that they are based on a dam at a point where defendant has never owned or claimed land or rights on the south side of the Dan River and would affect numerous tracts held by private owners and perhaps lands previously acquired by the United States, public highways, other public property, railroads and other utilities.

Before these plans are received in evidence:

(a). *The matters above set out under point II hereof should be determined.*

(b). The burden is on defendant to show the lands and rights required, those owned or claimed by it and a reasonable probability of acquiring outstanding necessary lands or rights.

(c). Any matters set out in plaintiff's interrogatory number six, which are not revealed by said plans, should be supplied by defendant.

(d). Plaintiff reserves the right to make other objection, subject to possible stipulation by the parties.

3. In its answer to plaintiff's interrogatory number six plaintiff claims the right to build any dam at any point it may desire which would not raise the water level more than eight feet above the usual water level at Rogers Island.

If defendant owned or claimed any lands or rights in addition to those set out under point I hereof, it should be required to assert the same at pre-trial conference with full particulars as set out under points I and II hereof.

[fol. 281] IV.

Matters of value and valuation cannot proceed and should be reserved until the foregoing issues are determined.

Respectfully submitted, John Strickler, United States Attorney for the Western District of Virginia. By (S.) Murray A. Foster, Special Assistant to the United States Attorney. (S.) W. Braxton Miller, Attorney, Department of Justice.

Certificate of Service by Mailing

[omitted in printing]

[Emphasis added]

(Note: Compare Stipulation of Facts, filed January 18, 1954, Government's Appendix, pages 84-88.)

67-70

[fol. 282] In United States District Court

Points and Authorities in Support of Motion by Plaintiff for Pre-Trial Conference—Filed December 4, 1953.

I

First: Under the public acts and records set out in plaintiff's motion for pre-trial conference, the Dan River is clearly an interstate navigable river under controlling authorities. *United States* v. *Appalachian Power Co.*, 311 U. S. 377 (1940). This case should be read in the light of the able opinions and dissents in the courts below, *United States* v. *Appalachian Electric Power Co.*, 107 F. 2d 769 (C.A. 4, 1939); *Idem*, 23 F. Supp. 83 (W.D. Va. 1938).

It will be submitted at pre-trial conference that the public records of navigation on the Dan River are sufficient to bring it within the scope of Appalachian Power cases, without going to the time and expense of proof there involved with respect to the New River. In that regard plaintiff requests that the matters set out in its motion be supple-

mented by page 25 of House Document No. 65, 74th Cong., 1st Sess., in words and figures as follows:

Roanoke River, Va. and N. C.

IV. Navigation

45. Roanoke River and its principal tributary, the Dan, were important arteries of commerce prior to the advent of railroads and highways. A decline in the use of these rivers began about 1840. At present the commerce is confined to the lower stretches.

Bridges

46. The navigable stretches, under existing law, are: Roanoke River, mouth to Clarksville, Va.; Roanoke-[fol. 283] Staunton River, Clarksville to mouth of Pigg River; Dan River, mouth to Madison, N. C. Table 3 gives data as to location, horizontal and vertical clearances, use and ownership of bridges over these navigable sections.

Of course the Court may take judicial notice of this document and the page is inserted here for the convenience of the Court.

"Second: A riparian owner has no property right in the use of the water or in the fall and flow of a navigable river in a taking by the United States under the Commerce Clause.

1. The taking in this proceeding is specifically authorized for the benefit of navigation, flood control and other purposes under the Act of December 22, 1944, 58 Stat. 887, section 10, pages 891, 894.

Flood control, as well as navigation, is an inseparable part of the Commerce Clause. *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 516-530 (1941); *United States* v. *Chicago, M. St. P. & P. R. Co.*, 312 U. S. 592, 595 (1941); *United States* v. *Appalachian Power Co.*, 311 U. S. 377 (1940). The rule is summarized in the *Appalachian Power Co.* case (p. 426):

> " " " Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of the commerce control

> * * *. That authority is as broad as the needs of commerce. Water power development from dams in navigable streams is from the public's standpoint a by-product of the general use of the rivers for commerce. * * *.

These authorities are soundly based on the first authoritative construction of the Commerce Clause, *Gibbons* v. *Ogden*, 22 U. S. 1, 188, 192 (9 Wheat, 1824).

[fol. 284] The authorities are ably summarized in *United States* v. *West Virginia Power Co.*, 122 F. 2d 733 (C.A. 4, 1941), cert. den., 314 U. S. 683 (1941. There the Court eliminated all distinction between navigation and flood control as being under the Commerce Clause (pp. 737-738) and concluded (p. 738):

> * * * The fact that production of power is combined with flood control in the project does not condemn it; for it is for Congress to say what type of project will best serve the constitutional purpose it is pursuing and to what extent flood control should be sacrificed to power production so as to make the project economically feasible. * * *.

2. Aside from the title to the 3.35 acres constituting Tract No. NI-3537A, all of the rights claimed by the defendant power company are to build and rebuild dams in the river to raise the water level thereof in order to utilize its flow and pressure and related water and water power rights and privileges. Such riparian rights are not private property for which just compensation is payable by the United States when taken and appropriated for the purposes here involved. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 69-74, 76 (1913), as construed and approved in *United States* v. *Willow River Power Co.*, 324 U. S. 499, 508-509 (1945); *United States* v. *Commodore Park, Inc.*, 324 U. S. 386, 391-392 (1945); *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 423-424, 427 (1940).

United States v. *Washington Water Power Co.*, 41 F. Supp. 119 (E.D. Wash. 1941), modified and affirmed 135 F. 2d 541 (C.A. 9, 1943), cert. den., 320 U. S. 747 (1943); *Continental Land Co.* v. *United States*, 88 F 2d 104, 109-110 (C.A. 9, 1937).

[fol. 285] The Supreme Court succinctly summarized the rule in the *Appalachian Power Co.* case, 311 U. S. at pp. 423-424, and concluded at p. 427:

> * * * It is now a question whether the Government in taking over the property may do so at less than a fair value. It has been shown * * * that there is no private property in the flow of the stream. This has no assessable value to the riparian owner. If the Government were now to build the dam, it would have to pay the fair value, judicially determined, for the fast land; nothing for the water power. * * *.

Again it is stated in *Continental Land Co. v. United States, supra,* (p. 109):

> * * * The riparian owner has no property right to the use of the water or the power inherent therein, or the fall and flow of the water for commercial purposes, or any purpose, as against the United States. * * *.

Under the uniform holding of the courts defendant holds only riparian rights which are not private property and which have no assessable value as against the United States. However, flowage easements were directly involved in *United States v. West Virginia Power Co.*, 56 F. Supp. 298 (S.D. W.Va. 1944). There the Court summarized the rule and stated (p. 303):

> * * * The only possible value of the easements owned by it in these lands is their value for water power purposes. In view of my conclusions announced above, there can be no such value as against the United States.

In *United States v. Powelson*, 319 U. S. 266 (1943), the [fol. 286] rule was recognized as established, but the Court held that it was not necessary to that decision to determine whether the rule should be extended to the non-navigable portions of a navigable stream (p. 273). The case of *Grand River Dam v. Grand-Hydro*, 335 U. S. 359 (1948) was clearly distinguished by the Court on the ground that the taking was not by the United States nor by one of its licensees (p. 373),

The case of *United States* v. *3,928.09 acres of land*, 114 F. Supp, 719 (W.D. S.C. 1953) is under preparation for appeal to the Fourth and Fifth Circuits.

II

The above-established rule should control and determine this case insofar as the claim of the Virginia Electric and Power Company is concerned. However, in event there should be a doubt in the Court's mind the next question which should be taken up is whether the defendant held any substantial portion of an integrated dam and reservoir site.

The burden of proof generally and to establish by competent evidence all elements of value is on the defendant. *United States* v. *Powelson*, 319 U. S. 266, 273-274 (1943); *Anderson Tully Co.* v. *United States*, 189 F. 2d 192, 197 (C.A. 5, 1951), cert. den., 342 U. S. 826 (1951); *Bank of Edenton* v. *United States*, 152 F. 2d 251, 253 (C.A. 4, 1945); *United States* v. *Certain Parcels of Land in Rapides Parish*, 149 F. 2d 81, 82 (C.A. 5, 1945).

However, to save both parties inordinant expense all facts about which there is no dispute should be stipulated. To that end under point II of its motion for pre-trial conference, counsel for plaintiff has undertaken to set out in order and accurately all of the facts heretofore admitted of record in this cause as to defendant's holdings.

[fol. 287] Subdivisions 2(a)-(e), 3 and 4 of point II of the motion for pre-trial conference relate to the rights claimed in Tracts Nos. FF-3100E and BB-2739. There counsel for plaintiff has endeavored to consolidate all of the rights granted under deeds pleaded by the defendant. The construction of these deeds is of course for the Court. But the parties should certainly agree insofar as possible and attempt to put grants in clear-cut language for purposes of evaluation.

There appears to be no dispute except in the construction of the rights granted by the Falkland Estate deed of October 14, 1925 (Dft's Exhibit "C"), to build any dams at any point or points desired, "so that the normal water level behind said dam, or dams, shall be no higher than the extreme height to which said Middle Virginia Power Company has the right to elevate the waters of the Dan River, in the aforesaid deed from Halifax Power Company."

The rights referred to in this language as being acquired by Middle Virginia Power Company through Halifax Power Company were to erect two dams at Rogers Island, one of which would elevate the water of the river 6½ feet, and the other 8 feet above the usual water level. Rogers Island is several miles upstream from the extreme upstream end of the Falkland property. The extreme height at that point was of course 8 feet.

Plaintiff contends that under the plain language of the deed the right to build and rebuild dams across the Dan River under the Falkland grant was confined to dams which would not raise the water level more than 8 feet "behind said dam or dams."

To the contrary, defendant contends, in its answer to plaintiff's interrogatory No. 2, that the Falkland grant would give it the right to build any dam or dams which [fol. 288] would raise the water level of said river no higher than 8 feet above the usual level at Rogers Island. This construction greatly expands the rights in violation of the plain terms of the Falkland deed, which fixes the maximum water level at a point "behind said dam or dams." Deeds should be construed as a whole giving due regard to all the language therein. *Virginia Ry. Co.* v. *Hood*, 152 Va. 254, 258-262, 146 S. E. 284 (1929).

Until these matters are determined and until defendant reveals whether it has or claims any other lands, rights, privileges or easements other than those presently stated by it, it is impossible to even define and plat the rights claimed.

III

The burden is particularly upon the defendant to show a reasonable probability of combining its holdings with other lands for use for power purposes. *United States* v. *Powelson*, 319 U. S. 266, 275-276 (1943); *Olson* v. *United States*, 292 U. S. 246, 257, 260 (1934).

Before this case proceeds further defendant should be required to show how it proposes to meet that burden and particularly to furnish or set out its contentions with respect to the matters raised under point III of plaintiff's motion for pre-trial conference.

As will be more specifically illustrated to the Court at pre-trial conference, as matters now stand, defendant never

acquired a nucleus for a dam and reservoir site. Defendant apparently contends that it has the right to build a dam at any point it desires, regardless of whether it owns land or rights on both sides of the river and how many tracts of public and private land would have to be acquired in connec-[fol. 289] tion therewith, in complete disregard of the rule of the above cases.

Respectfully submitted, John Strickler, United States Attorney for the Western District of Virginia. By (S.) Murray A. Foster, Special Assistant to the United States Attorney. (S.) W. Braxton Miller, Attorney, Department of Justice.

CERTIFICATE OF SERVICE BY MAILING

(omitted in printing)

[fol. 290]

Excerpts From Reporter's Transcript of Trial Proceedings Before John Paul, District Judge, Roanoke, Virginia.—January 18, 1954

OPENING STATEMENTS

Mr. Ferrell [Counsel for Vepco]:

May the Court please, I think that as an opening statement all that need be said is that we are prepared now to put on evidence as to value of the land involved in FF-3100E, which is otherwise known as the Faikland Tract. In that particular case, the stipulation which has just been filed with Your Honor agrees that under one interpretation of certain deeds VEPCo has the permanent and perpetual right to flood 1,540 acres of land up to contour 321, plus or minus.

The Court: How many acres?

Mr. Ferrell: 1,540 acres. Under the construction of certain instruments, as construed by the Government, we have, according to the stipulation, practically no lands over which we have a right to flood.

That is a question of law and of course we would not go into that with the witnesses, except that we will show, and the Court may consider it in the event the Court feels that there is an ambiguity in the instrument under which VEPCo acquired its flowage rights, that the intention of the parties certainly was that VEPCo has the right to overflow the land up to contour 321, plus or minus.

* * * * * * *

The Court: I understand that there are 1,840 acres in the 3100E?

[fol. 291] Mr. Ferrell: Yes, Your Honor.

The Court: I understood you to say 1,500.

Mr. Ferrell: 1,540 acres in which VEPCO claims an interest. The difference between the 1,840 and the 1,540 were acquired from, we take the position, Mrs. Williams, the owner of the fee. It is in addition to what VEPCo had there.

The Court: All right.

Mr. Miller [Government Counsel]: May it please Your Honor, I think, under the circumstances of this case, I believe the Government shoulld not reserve its opening statement with respect to the evidence. May I make an opening statement later as to our evidence, but I should like to state our position now.

The Court: All right, sir.

Mr. Miller: May it please Your Honor, the Government's first contention is this. Under the stipulation of facts handed to Your Honor and filed in this case as of this date, signed by the attorneys for the United States and attorneys for the Virginia Electric and Power Company, dated the 18th day of January 1954, and under exhibits 1, 2, 3 and 4 attached thereto, and the respective deeds already before the Court and referred to therein, we contend that the only issue before Your Honor in this controversy between the United States on one side and VEPCo on the other, is the fee simple value of Tract J-3537A, and for these reasons:

First. It has appeared in the record, and I think the stipulation covers it by reference, that there is an agreement between the United States and the former fee owner of Tract FF-3100E as to the fee simple value, as to the value due the fee owner, for that tract in the sum of $1.00.

[fol. 292] At this time I would like to file—of course, I cannot offer it in evidence now, but I would like to file with the clerk of the court and the Court, and in this case, a duly certified copy of the option agreement between the United States and Olive Vaughan Williams, which Mrs. Williams offered her interest in Tract FF-3100, for $1.00. The instrument being signed by Olive Vaughan Williams on April 30, 1951, and accepted for the United States on May 31, 1951. I have that ready to file in court.

Mr. Ferrell: We have no objection to your filing it at this time so we can get that straight.

Mr. Miller: All right. With the consent of everyone, then, I might introduce that in evidence now as a Government exhibit in this case, if there is no objection to being out of turn.

Mr. Ferrell: No objection.

Mr. Miller: To get that out of the way, then, I will ask that this option contract between Olive Vaughan Williams and the United States be marked.

(The option contract was received in evidence as Government Exhibit 1.)

Mr. Miller: Under that settlement or that option contract fee will be which is deposited in court.

The Court: Yes, sir.

Mr. Miller: That leaves nothing as will appear from the stipulation in VEPCo aside from Tract JJ-3537A, except certain rights set out in the stipulation by reference, which all have to do with water rights, water power, and water privileges, including the right to construct and maintain dams or other works on the lands referred to and described in the said stipulation.

[fol. 293] There is one deed, the second deed mentioned in paragraph 10, I believe, of the stipulation—one deed we could not agree on its meaning, but it was confined, whatever its meaning is, to the right to dam water, water power rights and privileges and related rights to that.

Now, the Government's first position with respect to that is that under the taking in this case the land is being taken under the Flood Control Act of 1944 for benefit of flood control and navigation purposes primarily. Power, of course, also is involved. The courts hold that is immaterial.

Our first position is that, under the cases. And, second, the Dan River is an interstate navigable stream.

I think, may it please Your Honor, I think Your Honor could accept notice of that now as a judicial notice. There has been filed here before the Court the records of the state acts of Virginia, records of the federal court—I refer to the motion for pretrial conference—acts of the State of Virginia, acts of the State of North Carolina. In addition—

The Court: Supposing it is a navigable stream, what is the particular pertinency, Mr. Miller?

Mr. Miller: Based on that, then we will say, under the rule—under the rule, and this is our primary position under the rule established, VEPCo having assigned from Tract JJ-3537A, having no rights except rights dependent upon the flowage and the fall of an interestate navigable stream. Those rights are not private property as against the United States and they are not compensable in this action, and the authorities have been cited to Your Honor under points of the authorities in the support of our motion for pretrial conference. That ruling is not been made. We ask for the ruling now.

The ruling goes back to the Chandler Dunbar case, sustained by all of the circuit court of appeals cases; and with-[fol. 294] out exception in any appeal at court that rule has never been deviated from. That is our first position in this case.

Our second position is that under the stipulation and the facts before Your Honor—before I state the position, let me say that by stating these subsidiary points I do not want to be understood of waiving the primary point of navigation. We think that controls this case and should end the case. But a secondary point, subsidiary point, under the stipulation before Your Honor, and under the exhibits before Your Honor, and under the composite segment map which is before Your Honor and I assume will be offered in evidence shortly, the Virginia Electric and Power Company does not have sufficient—have acquired sufficient rights, substantial enough portion of power rights, to show a reasonable probability of ever developing power rights on their property or acquiring the necessary lands in connection therewith.

The facts before Your Honor under stipulation and on the maps do not bring them in or give them a possibility of coming within the rule of the Powelson case. May it please Your Honor, if the Powelson case be extended to cover the holdings—such holdings as VEPCo has in this case, then all condemnors in such takings as these might just as well get prepared to pay the power value or have it adjudicated for every landowner that owns a substantial portion of the land on either side of the river. Not on both.

Mr. Ferrell. I hate to interrupt, but, may the Court please, we have gone over this two or three times—twice I am sure about, and we are here today to try the issues as we understand them of what the fair market value of the land involved is.

The Court: Yes.

Mr. Ferrell: We have the witnesses here who are men [fol. 295] whose time I think could be better put to use by putting them on the stand and having their testimony. And if Mr. Miller wants to argue this thing for the third or fourth time, as the case may be, we can do it after the evidence is in. I cannot see how it is relevant as an opening statement to go over all of this that we have gone over before, unless His Honor wants to be refreshed as to what we talked about.

The Court: I remember you went into great length before me in Harrisonburg and previously out here in November, if I am not mistaken.

Mr. Ferrell: Yes, sir.

Mr. Miller: May it please Your Honor, I am, perhaps, being too full. I merely want to get our position clearly in the record and it will save time later on. I have one other point, later on, and I will be very brief and will avoid argument, because it is before Your Honor anyhow on the pretrial conference and points of authorities.

The last and subsidiary point, I want to call Your Honor's attention to the position of the Government, and relates also to the Powelson case, is that under the stipulation of facts all of the rights that VEPCo once had in the JJ segment, as shown on this composite segment map, are gone and have long been since abandoned as a matter of law, under the law which they were acquired. Abandoned as clearcut law of the statutes and the court holdings of the State of Virginia.

With that, Your Honor, the Government at this time will take the position that any evidence—we ask for a ruling on pretrial conference and we ask for a ruling now—that there is no issue involved in this case between VEPCo and the United States except the fee simple value of Tract JJ-3537A.

The Court: Go ahead now, Mr. Ferrell.

. . . . . .

[fol. 296] IN UNITED STATES DISTRICT COURT

APPELLANTS STATEMENT OF POINTS ON APPEAL—
Filed June 1, 1954

The United States of America, appellant in the above-entitled case, makes the following statement of points on which it intends to rely upon appeal:

1. The district court erred in failing to find that the Dan River is an interstate navigable stream and that consequently the water power and other riparian rights in the Virginia Electric and Power Company are not compensable in a taking by the United States under the commerce clause of the Federal Constitution.

2. The district court erred in ruling that the measure of value of the Virginia Electric and Power Company's flowage rights was the fee value of the servient land.

3. The district court erred in rejecting the Government's offer of proof as to the extent of damages which would be caused by the operation of the John H. Kerr Dam and Reservoir.

4. The district court erred in entering judgment for the Virginia Electric and Power Company in the amount of $61,000.00 based on the full fee value of the land.

United States of America, By (s) Perry W. Morton, Assistant Attorney General. (s) Roger P. Marquis, Attorney, Department of Justice, Washington, D. C.

[fol. 297] CERTIFICATE OF SERVICE

(omitted in printing)

EXCERPT FROM PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM 1954, NO. 41, UNITED STATES OF AMERICA, PETITIONER v. VIRGINIA ELECTRIC AND POWER COMPANY.

At page 6, footnote 3:

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[3] The owner in fee is not involved. She agreed to convey to the Government *any flowage rights she may have retained*, for the consideration of one dollar. (R. 71-82; App., 2a).

And at pages 8-9, footnote 6:

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[6] For the reasons briefly indicated in this note, we believe that the court's error in holding in favor of compensability was compounded when it held that respondent was entitled to compensation measured by the value of the fee. We do not urge this as a separate [fol. 298] ground for granting the writ, but wish to reserve the right to present the point in the event that the Court grants the writ and sets the case down for argument.

There is no finding that was a reasonable probability that respondent's flowage easement, which had lain dormant for many years, would be utilized by respondent, and certainly no finding which you justify equating respondent's interest with the value of the entire fee. The court below relied upon the fact that the Government, as condemnor of the easement, will overflow the land. But the value of the easement in the Government's hands is not the test (even if it were, there would still be the necessity of offsetting the benefits conferred by the project upon the fee owner's adjoining lands, see R. 36); plainly, under the decisions of the Court, the public need pay only for what the

condemnee has lost. *Bauman* v. *Ross*, 167 U.S. 548, 574.

The court of appeals sought to buttress the allowance of fee value to the easement-holder by pointing to the fact that the fee owner was willing to convey to the Government for one dollar such flowage rights as she retained (App., 3a). But there is nothing in the record to support the notion that the fee owner's land was valueless while respondent had an outstanding easement, or that the fee owner so regarded it. So far as the record indicates, it appears that Mrs. Olive Vaughan Williams, the fee owner, was content to have an artificial lake on a comparatively small portion of her estate, because this would enhance the attractiveness and value of her remaining lands which constitute "a wonderful hunting preserve and a wonderful timber growing preserve" (R. 36). For this reason, it would seem, she has not seen fit to claim that the value of the tract directly involved was diminished as a result of condemnation of the flowage easement over that tract.

[fol. 299] In United States District Court

Excerpt from Petition of the Appellant for Rehearing and Motion for Leave to Present Proof Showing Factual Assumption of Opinion is Erroneous.—Filed August 30, 1956.

At page 3:

. . . . . .

Moreover, the option agreement included 380 acres embraced in the Government's taking in which neither the Virginia Electric and Power Company (hereafter referred to as Vepco) nor any other party except the owner had an interest (Appendix, *infra*, p. 11). This is absolute proof that the settlement was not, as this Court's opinion assumes, addressed merely to a theoretical interest of no practical value. The opinion states: "If Mrs. Williams were the owner of the entire interest in the land, no one would contend that she would not be entitled to compensation for the condem-

nation of flowage rights by the government." That was precisely the situation as to the 380 acres. . . .

. . . . . .

(NOTE: On page 11 of the Appendix referred to above is the letter from James S. Easley to R. P. Buford, dated June 7, 1950, which was not a part of the record in the case on August 30, 1956. This letter was introduced at the hearing on November 24, 1958, marked "Plaintiff's Exhibit 3", and is printed in the Government's Appendix beginning at page 200).

And at pages 5-6:

. . . . . .

3. *This Court has ordered the use of an erroneous measure of value.*—The measure of value ordered by [fol. 300] this Court to be applied in this case, i.e., the difference between the value of the land with and without the servitude of the Government's easement excluding from valuation in both instances any element of value arising from the availability of the land for water power purposes due to its being situated on a navigable stream would be proper if a fee owner's interest were being valued. It is not, however, a proper measure of an interest which embraced only a pre-existing flowage easement.

And at page 8:

Motion for Leave to Present Proof Showing Factual Assumption of Opinion Is Erroneous

The United States of America, appellant herein, moves this Court for leave to file certified copies of appropriate matters from its files showing the considerations for the settlement of the claim to compensation of the fee owner if this is to have any bearing upon the outcome of the case.

Respectfully submitted, Perry W. Morton, Assistant Attorney General. John Strickler, United States Attorney, Roanoke, Va. Roger P. Marquis, Harold S. Harrison, Attorneys, Department of Justice, Washington, D. C.

August 1956.

[fol. 301] IN UNITED STATES DISTRICT COURT

EXCERPTS FROM THE MANDATE FROM UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT. Filed September 24, 1956

United States of America, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA:

To the Honorable Judge of the United States District Court for the Western District of Virginia.

Greeting:

WHEREAS, *lately in the* ——— United States District Court for the Western District of Virginia, ——— *before you or some of you, in a cause between* United States of America, Plaintiff, and 297.972 acres of land, more or less, in the County of Halifax, Virginia, Olive Vaughan Williams, et als., and unknown Owners, Defendants; No. 296 Civil; wherein the judgment of the said District Court, entered in the said cause on the 18th day of January, 1954, is in the words following, to wit:

. . . . . .

as by the inspection of the ———, *record of the said District Court,* ——— *which was brought into the United States Court of Appeals for the Fourth Circuit, by virtue of* the appeal of the said United States of America,

———

agreeably to the act of Congress, in such case made and provided, fully and at large appears.

[fol. 302] And whereas, in the term of March, in the year of our Lord one thousand, nine hundred and fifty-six, the said United States Court of Appeals, for the Fourth Circuit entered the following order:

"In the above entitled case it appearing that the judgment of this Court has been vacated by the Supreme Court of the United States and that the case has been remanded to this Court for further consideration in the light of the decision of the Supreme Court rendered January 23, 1956, in the case

of United States v. Twin City Power Company, No. 21, October Term, 1955:

"Now therefore, it is ordered that this case be set down for hearing at the June term, 1956, of this Court at Asheville, North Carolina, and argument to be restricted to questions which may be raised in the light of the aforesaid decision of the Supreme Court and to refer to no other questions. *The appellant may file a brief limited to questions raised under said decision of the Supreme Court provided same is filed not later than May 19, 1956, and the appellees may file a brief in answer thereto not later than May 29, 1956.* [Emphasis supplied]

"March 29, 1956.

And whereas, *in the term of* —— June ——, *in the year of our Lord one thousand nine hundred and* —— fifty-six ——, *the said cause came on to be heard before the said United States Court of Appeals for the Fourth Circuit, on the said* —— *record, and was argued by counsel.*

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said [fol. 293] District Court, appealed from, in this cause, be, and the same is hereby, vacated; and that this cause be, and the same is hereby, remanded to the United States District Court for the Western District of Virginia, at Lynchburg, with direction to award to the Virginia Electric and Power Company as compensation for the taking of the easement condemned the difference between the value of the land with and without the servitude of the easement, excluding from the valuation in both instances any element of value arising from the availability of the land for water power purposes due to its being situate on a navigable stream, in accordance with the opinion of the court filed herein.

John J. Parker, Chief Judge, Fourth Circuit. Morris A. Soper, United States Circuit Judge. Albert V. Bryan, United States District Judge.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in accordance with the opinion and the judgment of this Court, ——

according to right and justice, and the laws of the United States, ought to be had, the said ——————— appeal ——————— *notwithstanding.*

Witness *the Honorable Earl Warren, Chief Justice of the United States, the* —— 19th ——— *day of* —— September ———, *in the year of our Lord one thousand nine hundred and* —— fifty-six.

[fol. 304] No costs adjudged:

(s) Richard M. F. Williams, Jr., Clerk of the U. S. Court of Appeals for the Fourth Circuit.

September 8, 1956, order staying mandate pending petition of appellant for rehearing filed.

September 11, 1956, order denying rehearing filed.

In United States District Court

Exhibit "A" Attached to Order Appointing Commissioners—Entered May 1, 1958.

Tract No. FF-3100E

Parcel A

All that certain tract or parcel of land lying and situate in Roanoke Magisterial [sic] District, Halifax County, Virginia, bounded and described as follows: Beginning at a point in the center of Banister River at a common corner with lands of Paul C. Edmunds on the north; thence, with the lands of Paul C. Edmunds north 40° 10' east 2341 feet; thence, with the lands of W. J. Smith south 02° 40' east 320 feet, south 05° 05' east 445 feet and north 75° 00' east 659 feet to an iron pin on a contour line having an elevation of 330 feet above mean sea level as determined from the Sea-level Datum of 1929 through the medium of the Southeastern Supplementary Adjustment of 1936 by the United States Coast and Geodetic Survey; thence, a new line of division with the lands of Olive Vaughan Gibbon Williams generally [fol. 305] southwesterly, northeasterly, and northerly along the said 330 foot contour line as its meanders approximately 22500 feet to an iron pin on Mrs. R. A. Smith line; thence,

with the lands of Mrs. R. A. Smith south 62° 35' east 50 feet and north 73° 35' east 158 feet to the center of Peters Creek; thence, generally northerly and upstream along the center line of Peters Creek as it meanders approximately 715 feet to the center of Virginia State Road No. 716 being a common corner with lands of B. J. Smith and Katherine Smith and the lands of Paul C. Edmunds; thence, off the creek with the lands of Paul C. Edmunds northeasterly along the center line of Virginia State Road No. 716 as it meanders approximately 350 feet to a point on the aforesaid 330 foot contour line; thence, again a new line of division with the lands of Olive Vaughan Gibbon Williams very generally southerly, easterly then northeasterly along the said 330 foot contour line as it meanders approximately 33000 feet to an iron pin on Paul C. Edmunds line; thence, with the lands of Paul C. Edmunds north 87° 40' east 1026 feet and north 15° 35' east 250 feet to an iron pin on the aforesaid 330 foot contour line; thence, again a new line of division with the lands of Olive Vaughan Gibbon Williams very generally southeasterly along the said 330 foot contour line as it meanders approximately 68000 feet to an iron pin on Paul C. Edmunds [sic] line; thence, with the lands of Paul C. Edmunds south 05° 40' west 236 feet and south 08° 15' east 1248 feet to the low water line along the northeast bank of the Dan River; thence, northwesterly and upstream along the low water line of the northeast bank of the Dan River as it meanders approximately 26800 feet to the mouth of the Banister River; thence northwesterly then northerly and upstream along the center line of the Banister River as it meanders approximately 7720 feet to [fol. 306] the point of beginning, containing 1762.8 acres, more or less, and

Being a part of the land devised to Olive Vaughan Williams, formerly Olive Vaughan Gibbon, by Will of Hannah N. Vaughan recorded 2 April, 1951 in the Clerk's Office of the Circuit Court of Halifax County, Virginia in Will Book 51, Page 3.

Parcel B

All that certain tract or parcel of land lying and situate in Red Bank Magisterial District, Halifax County, Virginia, the same being an island in the Dan River known as Pollards Island, the eastern end of said island is located oppo-

site the mouth of Hyco River and the same lies south of and opposite the lands of the said Olive Vaughan Gibbon Williams known as the Falkland Estate and contains 44.4 acres, more or less, and

Being a part of the land devised to Olive Vaughan Williams formerly Olive Vaughan Gibbon, by Will of Hannah N. Vaughan recorded 2 April, 1951 in the Clerk's Office of the Circuit Court of Halifax County, Virginia in Will Book 51, Page 3.

Parcel C

All that certain tract or parcel of land lying and situate in Red Bank Magisterial District, Halifax County, Virginia, the same being an island in the Dan River immediately northwest of Pollards Island and south of an [sic] opposite the lands of the said Olive Vaughan Gibbon Williams known as the Falkland Estate and contains 21.2 acres, more or less, and

Being a part of the land devised to Olive Vaughan Williams, formerly Olive Vaughan Gibbon, by Will of Hannah N. Vaughan recorded 2 April, 1951 in the Clerk's Office [fol. 305] of the Circuit Court of Halifax County, Virginia in Will Book 51, Page 3.

Parcel D

All that certain tract or parcel of land lying and situate in Red Bank Magisterial District, Halifax County, Virginia, the same being an island in the Dan River immediately north of Pollards Island and south of and opposite the lands of the said Olive Vaughan Gibbon Williams known as the Falkland Estate and contains 7.2 acres, more or less, and

Being a part of the land devised to Olive Vaughan Williams, formerly Olive Vaughan Gibbon, by Will of Hannah N. Vaughan recorded 2 April, 1951 in the Clerk's Office of the Circuit Court of Halifax County, Virginia in Will Book 51, Page 3.

Parcel E

All that certain tract or parcel of land lying and situate in Roanoke Magisterial District, Halifax County, Virginia, bounded and described as follows: Beginning at a point on the line dividing lands of Olive Vaughan Gibbon Williams on the west and lands of Annie B. Edmunds on the east, said

point is south 05° 25' east 990 feet, measured along said dividing line from the northwest corner of the said lands of Annie B. Edmunds, said point of beginning is further identified as located on a contour line having an elevation of 330 feet above mean sea level as determined from the Sea-level Datum of 1929 through the medium of the Southeastern Supplementary Adjustment of 1936 by the United States Coast and Geodetic Survey and is the north-east corner hereof; thence, with the lands of Annie B. Edmunds south 12° 36' 06" west 619.60 feet to a point on the aforesaid 330 foot contour line; thence, a new line of division with the [fol. 308] lands of Olive Vaughan Gibbon Williams generally northwesterly then easterly along the said 330 foot contour line as it meanders approximately 1730 feet to the point of beginning, containing 3.6 acres, more or less, and

Being a part of the land devised to Olive Vaughan Williams, formerly Olive Vaughan Gibbon, by Will of Hannah N. Vaughan recorded 2 April, 1951 in the Clerk's Office of the Circuit Court of Halifax County, Virginia in Will Book 51, Page 3.

Parcel F

All that certain tract or parcel of land lying and situate in Roanoke Magisterial District, Halifax County, Virginia, bounded and described as follows: Beginning at a point on the line dividing the lands of Hannah N. Vaughan on the west and the lands of Annie B. Edmunds on the east, said point of beginning is south 05° 25' east 990 feet, south 12° 36' 06" west 619.60 feet, south 02° 42' 06" west 718.57 feet and south 21° 00' 10" west 83.93 feet measured along said dividing line from the northwest corner of the said lands of Annie B. Edmunds, the said point of beginning is further identified as located on a contour line having an elevation of 330 feet above mean sea level as determined from the Sea-level Datum of 1929 through the medium of the Southeastern Supplementary Adjustment of 1936 by the United States Coast and Geodetic Survey and is the north-east corner hereof; thence, with the lands of Annie B. Edmunds south 27° 31' 44" west 92.40 feet to a point on the aforesaid 330 foot contour line; thence, a new line of division with the lands of Hannah N. Vaughan northwesterly then easterly along the said 330 foot contour line as it

meanders approximately 780 feet to the point of beginning and containing 0.8 of an acre, more or less, and

[fol. 309] *Being* a part of the land conveyed to Hannah N. Vaughan by a deed from Selina J. Boxley and John Boxley, her husband, dated March 12, 1941, and recorded in the Office of the Clerk of the Circuit Court of Halifax County, Virginia, in Deed Book 162, page 539.

IN UNITED STATES DISTRICT COURT

EXHIBIT "B" ATTACHED TO ORDER APPOINTING COMMISSIONERS—Entered May 1, 1958

(b) The full, complete, and perpetual right, power and privilege to overflow permanently or intermittently, as may be necessary as a result of the construction, maintenance and operation of the John H. Kerr Dam and Reservoir, Tract No. FF-3180E, Pars. A, B, C, D, E and F, together with the right, power and privilege to go upon the lands involved from time to time as the occasion may require to accomplish any activities in connection with the maintenance and operation of the John H. Kerr Dam and Reservoir and to remove from said lands natural or artificial structures or obstructions which, in the opinion of the representatives of the United States in charge, may be detrimental to the maintenance and operation of said project, reserving, however, to the owner(s) and their assigns, all such rights and privileges as may be used and enjoyed without interfering with or abridging the rights and easements acquired by the United States, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipelines.

(Note: The above is the same as paragraph (b) of Exhibit "C" attached to the Complaint, filed October 23, 1952. See Government's Appendix 5 and 11-12.)

[fol. 310] In United States District Court

Excerpts From Reporter's Transcript of the Hearing Before the Commissioners on June 3, 1958—Filed August 8, 1958.

Statements of Counsel Re Exhibits

Mr. Hanes:

We would like to stipulate that by agreement of counsel we are introducing as Government's Exhibit No. 1 a Map of the Buggs Island Reservoir, dated October, 1945, File No. GF 210A-0 Plate 4. This map shows Tract No. FF-3100 E in red.

Map is filed and marked as Government's Exhibit No. 1.

Mr. Hanes:

Also by stipulation of counsel we would like to introduce as Government's Exhibit No. 2, a Map captioned John H. Kerr Dam and Reservoir, Segment FF, dated May 21, 1951, on which map the area of Tract FF-3100 E is shown by a brown line. The land not a part of the tract owned by the defendants is shown in green. The area below elevation 302 consisting of 890 acres is shown in blue. The area between elevation 302 and 321 consisting of 650 acres is shown in yellow. And the area above elevation 321 and below 330 consisting of 300 acres is shown in salmon color.

Mr. Hanes:

Mr. Weaver, I would like to move for the separation of the witnesses.

[fol. 311] Mr. Ferrell:

We have no objection to that.

Mr. Weaver:

All witnesses who are to testify please leave the courtroom.

Mr. Ferrell:

May it please the Commission, we have previously stipulated as to the introduction of the Government's Exhibits Nos. 1 and 2, which you will see on the easel or blackboard

there; and we would like to introduce at this time by agreement the contour map which I have here, United States Department of Interior Geological Survey, edition of 1943, reprinted 1945, and published in 1953. And have it marked Defendant's Exhibit A. Unfortunately one of them is in green and one is in brown. On this map is superimposed the boundaries of Falkland Tract.

Map is filed and marked as Defendant's Exhibit A.

. . . . . .

Testimony of Robert C. Buford

Direct examination:

By Mr. Ferrell:

Q. Mr. Buford, will you state your full name and address?

A. Robert C. Buford, Lawrenceville, Virginia.

Q. And your occupation, sir?

[fol. 312] A. I am Real Estate Officer for the United States Army Corps of Engineers.

Q. Are you familiar with the case under consideration today?

A. I am.

Q. Have you participated in the preparation of this case for trial before the Commissioners?

A. To a certain extent.

. . . . . .

Opening Statement by Counsel

Mr. Ferrell:

Gentlemen of the Commission, this is really a simple issue and not any different from the ordinary condemnation case. The only trouble with this case is that under the inquiries of the Court it makes four different assumptions:

The first assumption is that here we have a tract of land of 7400 acres in Halifax County, Virginia, on the north side of the Dan River and east, I believe, of the Banister River as the two come together—the confluence I believe is the proper terminology—, and the Government is taking the

easement that we read yesterday. I won't undertake to summarize it because in one place it says permanently and the other intermitently, [sic] but anyway permanently or intermitently [sic] flood this land if necessary in connection with the operation of this Kerr Dam and Reservoir, which I think we all know is a flood control as well on the side it manufactures a little power.

[fol. 313] And the date of the taking in this case is October 23, 1952. The Court has also directed both in the inquiries and the instructions that no consideration whatsoever be given to the valuation of any of the land under any of the four inquiries for water power purposes, and as far as the defense is concerned we are not even going to attempt and we are not claiming now, and have not claimed, although there might be some argument about it but that is beside the point, we do not claim now any value for water power purposes. In other words, we think this tract of land should be valued for its highest and best use which the Court has told you doesn't necessarily mean the use to which it is put as of the time of the taking, but which is its highest and best use considering the matters in existence at that time and in the reasonably foreseeable future. Of course, we're in 1958 and have the advantage of looking back a little bit, but the instructions, of course, were given to you by the Court and you are to consider this thing as if you were standing on the land on October 23, 1952, in valuing the land as of that time.

One of the instructions is a little bit erroneous as we stated yesterday, and I trust that before this case is over we will stipulate what the true facts are, namely that the timber has been cut pursuant to an agreement on the area shown in blue on Government's Exhibit No. 2, which is the contour of the river and contour 302, plus or minus. You have been on the ground and saw some evidence of cutting and clearing, and we will have introduced here some evidence, and have introduced previous evidence, to show to what extent the clearing was done.

The timber value on that property, of course, has been taken off and paid for and has nothing to do with the case and our claim in this suit.

[fol. 314] The first inquiry is that you take the whole tract before and after the taking of the full easement as

described in the petition, which as we all know goes up to contour 330.

The second inquiry is similar to the first inquiry in that you start with the original assumption, that is, the entire tract before and after the taking of an easement, which for this purpose is assumed to extend not through all the colored area which you see on Defendant's Exhibit No. 2, but only those up to the contour 321, which is the beginning of the land shown in salmon or red on Government's Exhibit No. 2. In other words, the difference between 1 and 2 is that here in 2 the salmon or red land becomes part of the residue, and in No. 1 it was part of the extent of the flowage easement.

Inquiry No. 3 is unlike either one or two, in that now the Court tells you to assume that the 1840 acres, which incidentally has been stipulated in tract FF-3100E, is standing alone before the taking, and the taking, of course, is the easement described in the petition which is up to contour 330.

In other words, in Inquiry No. 3 the easement that is, imposed on the tract standing alone goes over the entire tract. There is no residue in the sense that there is a residual which is not subject to an easement. In other words, the fee owner doesn't have a fee ownership after the taking, under Inquiry No. 3.

Under Inquiry No. 4 however, he does. The fee owner, here the tract is standing alone, but the Commission is to assume that the easement described in the Government's separation of taking and petition does not go up over the entire tract or up to contour 330, but only extends up to contour 321. In other words, the easement right or servitude is somewhat limited. That means that under Inquiry No. 4, 300 acres which are shown in salmon, which is a thin stream, if you look at the Government's plat, and meanders up and [fol. 315] down the contours there, the 300 acres or less over which no servitude or easement is imposed. So in that case there could or could not be because the damages, if any, are to the residue of the land. There is a residue. Whether or not there is damage to the residue under Inquiry No. 4 is a matter for you gentlemen to determine.

We have obtained the best experts we know of to assist the Commission in arriving at a proper valuation. After all,

a matter of market value is something of an opinion, and it is sometimes called an educated guess. I don't think that any of the witnesses we offer speculate but they do have different opinions as to the values under the four inquiries. I am not going to say that one is better than the other, and all I can say is that the expert witnesses are certainly better than myself or Mr. Easley or Mr. Lowden as to what is the value of this land, and we have no preference as to which one, and we have brought them in here with different opinions so that you gentlemen may have their guidance and assistance in determining what will be the difference in the value before and after the taking under each one of these inquiries that the Court has propounded to the Commission.

Commissioner Weaver:

Mr. Ferrell, in your discussion of Inquiry No. 3, do I understand that we are to consider the entire easement alone and nothing else?

Mr. Ferrell:

If I understand your question, let me put it this way: you are to consider the tract FF-3100E what is the land before and after, and it is a tract of land with 1840 acres in it, which is a very irregular shape but it stands alone. It severed the ownership. The owner of the uplands is Mr. A, and the owner of the 1840 acres is Mr. B. And under 3, you see, the easement which the Government takes goes over all [fol. 316] the 1840 acres owned by Mr. B. In other words the extent of the servitude is over the entire tract standing alone.

Now, under 4 it is not over the entire tract standing alone. It is over the blue and the yellow, but not the salmon.

Does that answer your question and have I made myself clear?

Commissioner Weaver:

I think I understand what you're saying and all that, but I can't the way this inquiry is worded. I just can't do it, the way it is worded.

Mr. Ferrell:

I agree with you, it could have been worded better and I'll try to word it like I would if I didn't have any limitations under the law of previous court decisions.

You take this irregular piece of land 1840 acres standing alone.

Commissioner Weaver:

But that's not 1840 acres.

Mr. Ferrell:

Yes, sir. This red or salmon, the yellow and the blue aggregates 1840 acres. And the blue plus the yellow is 1540 acres, which is the extent of the easement under No. 4, under the supposition that you make under Inquiry 4.

Under the third inquiry the easement goes over the entire 1840 acres. Of course, because of the contours the water, and we already know from looking at it that the water is longer and more often in blue than it is in yellow, and by the same token it is longer in the yellow than it is in the salmon.

Commissioner Weaver:

So we consider the entire easement and no question of residue is involved at all?

[fol. 317] Mr. Ferrell:

Because there is no residue. The easement extends over the man's whole property. If you owned it or Mr. A owned it then all his property would be subject to the flow of the easement. Under No. 4 all of it would not be but it would be this 300 acres which is sorta like a thin line.

Mr. Hanes:

Gentlemen, I am sure that Mr. Ferrell and I can agree that our purpose here today is to try to clarify this matter and not to muddy the waters. Certainly it is an unusual type of situation.

I would like to address your attention to the first paragraph of the order which you have all received, and just by way of preliminary in mentioning this, in this district the defendants, represented by these gentlemen, have the burden of proving their case on the theory that the Government has already made an adequate settlement. Then in the first paragraph you will note that on motion of the defendant—

Mr. Ferrell:

I hate to interrupt you, but I will have to note my objection to that broad statement. The burden of proof is to the damage to the residue and it is no different. That's our position as to the damage to the residue and for the taking, of which we insist there is no burden of proof. And it is certainly not so stated by the Court in its instructions, so we will just have to take issue to that. I'm sorry.

Mr. Hanes:

The motion then that has been made by the defendant for the appointment of commissioners is to determine the just compensation to be paid to the defendant for the acquisition by condemnation by the United States of America of an easement over the tract of land designated and described in [fol. 318] this proceeding as Tract FF-3100-E.

Now, I don't wish to belabor this point, but I would like for you to turn to Exhibit B, if you have it convenient, and notice the phraseology of the Government's easement, which is the full, complete and perpetual right, power and privelege [sic] to overflow permanently or intermittently as may be necessary, as a result of the construction, maintenance and operation of the John H. Kerr Dam and Reservoir.

It is already in the record that the purpose of the Kerr Dam is for hydroelectric, and flood control purposes as other incidental benefits, but the purpose of the dam is very closely wed to the water power purposes.

Under the inquiries you are to exclude any value that may or may not enure to the land by virture of the fact that it is available for water power purposes. You are to subtract that from your valuation.

Mr. Ferrell:

You are to subtract?

Mr. Hanes:

I am simply saying that they are to exclude it. Subtract might be a little confusing. Make that to read exclude.

Now, the permanent right to flood under this easement involves the area below elevation 302. That is this blue area here on the map. The Government is given the right to flood that permanently. And you heard Mr. Buford explain earlier that the height yesterday was 301.85, just about up to the 302 level.

Mr. Ferrell:

I hate to interrupt again, but Gentlemen, the easement doesn't say that we are going to confine the permanent flooding up to 302, and in this case there is no evidence, and if there is I wish you would produce it.—

[fol. 319] Mr. Hanes:

There's evidence in the record, Mr. Ferrell, that the Government has the right to flood permanently up to 302.

Mr. Ferrell:

I haven't seen that and I've been in the case for a number of years and if you would give it to me I would like to see it. This is the first time I've heard of that. And certainly in the description and under the instructions of the Court it says to flood it permanently and intermittently the tract described as FF-3100 E. The aggregate is 4840 acres. They don't say up to contour so and so.

Mr. Hanes:

I don't want to take up your time, but I will summarize our whole case by saying this: that when we exclude from the easement its water power purpose, then we contend that it is of nominal value only. Now, our opinion varies from the gentlemen here almost 180 degrees, but our whole case is based on that contention.

Thank you.

Testimony of T. W. Clark

Direct examination.

By Mr. Ferrell:

Q. Mr. Clark, would you state your full name, address and occupation?

A. Thomas W. Clark. My home is in Charles City County, Virginia; my business is in Richmond, Virginia. I am a real estate agent.

Q. How long have you been in this real estate business, Mr. Clark?

[fol. 320] A. Since October, 1909.

Q. And what is your principal line of real estate work?

A. Well, we do a complete real estate business. I personally do appraisal work for the last few years.

Q. For whom have you done appraisal work, generally speaking?

A. I have done appraisal work for the United States Government, the State of Virginia, for several different counties, the Highway Department, some of the railroads, insurance companies, the banks, estates, and general appraisal business.

Q. Have you testified as an expert on values of real estate in Portsmouth, Virginia?

A. Yes, sir.

Q. In what courts?

A. Well, in the Federal Courts in Richmond, Norfolk, Danville, Roanoke, and state and county courts.

Mr. Hanes:

We can waive his qualifications, subject to the right of cross examination as to this particular land.

Mr. Ferrell:

Certainly, but it is our intention to show possible fields that Mr. Clark has been interested in.

Q. Mr. Clark, have you been employed in previous cases by the condemnor to make appraisals?

A. Yes, sir.

Q. And have you been employed in previous cases by the landowners?

A. Yes, sir.

[fol. 321] Q. Have you been employed by chance by the United States Government to appraise property in connection with the acquisition of the rights necessary for the construction, maintenance and operation of the Kerr Dam and Reservoir?

A. By the United States?

Q. The United States Government or any agency thereof?

A. I think I have, but I wouldn't swear to it. I think I have; it's so hard to keep all this stuff in mind. I think I have and yet I couldn't state positively.

Q. Have you previously appraised lands in the Kerr Dam area?

A. Oh, yes. I misunderstood your question. I thought you said for the United States Government.

Q. Well, I did.

A. Yes, sir, yes, sir.

Q. Have you done it for other landowners?

A. Yes, sir.

Q. You're sure of that?

A. Yes.

Q. But as to whether you have done it for the United States Government you are not so sure, is that correct?

A. Well, I think I did some pieces of land for the Government, but I am not positive about it now. I'm sorry that I can't be positive but there has been so much time elapsed and so much of this work going on that I can't keep it all in my mind.

Q. Are you familiar with land values in Halifax County, Virginia.

A. Well I feel that I am. I am sure that I have examined [fol. 322] a lot of it and appraised a lot of it. The first thing that I appraised as I recall it was that great body of land down here for the, I think it was, the Carolina Power and Light Company—a great body of land. And then I appraised a good body of land in here, as I recall it—I think I have it in proper sequence—for the Virginia Electric and Power Company.

Q. Other than the Falkland property?

A. Oh, this had no connection with the Falkland property.

Q. Do you generally appraise farm land as contrasted to city property?

A. I do both, but I probably appraise a great deal more country property than I do city.

Q. How about timberland, do you appraise timber land?

A. Yes, sir.

Q. Do you cruise timber?

A. Cruise timber, appraise and sold a great deal of merchantable timber.

Q. Were you employed to appraise the value of the Falkland tract before and after the taking by the Government in this case on October 23, 1952?

A. Yes, sir.

Q. Are you familiar with the Falkland land?

A. Yes, sir.

Q. Have you been on the property?

A. Oh, yes, sir.

Q. When were you first there that you made a note of it that you can tell us about it positively?

[fol. 323] A. The first time that I was actually there for the first time for the purpose of actually looking at this land was October, 1953.

Q. Was a Mr. Armistead Harvie with you on that occasion?

A. Yes, sir.

Q. Was he then employed by the same persons to make appraisals, or do you know?

A. Yes, sir.

Q. What is Mr. Armistead's condition as of today?

A. Well, I haven't seen him since two weeks ago last Friday, and on that day his condition was well critical, completely hopeless.

Q. Is he confined to his bed?

A. Oh, yes, sir, and has been for sometime.

Q. A year or two, has he not?

A. Yes, sir, but I mean he was decidedly worse the last time I went to see him; he was very, very much worse.

. . . . . .

Mr. Ferrell:

Q. On what other occasion, Mr. Clark, have you been on the Falkland property?

A. Well, a great many times. I can go through my notes and pick out the dates.

Q. Give us the number of times since 1953 approximately, more or less?

A. Let's see, more than six times and not as many as twenty.

Q. In preparation for your arriving at a conclusion did [fol. 324] you receive a copy of the order appointing commissioners in this case under which the Court has four inquiries?

A. Yes, sir.

Q. Did you study those carefully?

A. I read them very carefully more than once.

Q. Did you receive a copy of the Court's instructions to the commissioners in this case as to how they should proceed to evaluate this land?

A. Yes, sir.

Q. Did you study those carefully?

A. I read it very carefully more than once.

Q. In forming your opinion did you follow the Court's inquiries as best you could?

A. Yes, sir.

Q. Did you comply as best you could with the Court's instructions?

A. Yes, sir.

. . . . . .

Cross-examination:

By Mr. Hanes:

Q. But you also mentioned that there would be a considerable cost to put that land into shape for agricultural purposes?

A. That is correct, but I think I should add that when you did that it would be worth substantially more than the value on it now.

Q. Could you give us any figures as to what you consider would be the cost?

[fol. 325] A. Oh, that would be pretty hard. Some of it, some little of it would probably cost $50 or $60 an acre to get it in real good condition for cultivation. Most of it you could have gotten it in good condition. I'm just speaking of the

blue and yellow land, and you could have gotten it in shape for cultivation for not over $25 an acre. It hadn't been cultivated just from looking at it for two or three years, and there were brushes in parts of it. I think you would have had to bulldoze some of it before you could actually plow it, but not a heavy bulldoze job.

Q. When you first went on the land how was it being used?

A. I think the first time I went on it there was a substantial piece of corn in there. The corn was rather poor for some reason.

Q. You first went on it on what date?

A. In October, '53.

Q. This was a year after the taking?

A. That is correct. Now this wasn't a piece of corn put in there that year, but the stalks were still standing and showed where it had been in corn, probably the year before, or if someone contradicted me and said it was two years before that I couldn't argue that. It was still standing, the stalks were, and they had apparently run cattle in there and they had taken the ears of corn off.

Q. What was the general activity of the entire Williams farm as a whole at that time? What was the income producing activity?

A. Well, every indication was that the major source of income was the selective cutting and harvesting trees. But the farm, that is to say, 560 acres of open land, plus this open land down in the bottom, was being farmed apparently [fol. 326] with a herd of cattle they were building up as the consuming end of the farming. I assumed from what I saw that they were marketing cattle, and simply raising the feed to put through the cattle to put them in shape to market them. That in the rough is the impression I got from everything I saw there.

Q. With regard to the entire tract of 7400 acres, what percentage was forested and what percentage was cleared?

A. Well, of the 7400 acres, in addition to the blue and yellow land, which I recall is 1540 acres, plus 560, would be 2100 acres, was devoted to a more or less degree of pasturage and cultivation. The rest of it was entirely a timber proposition. And, of course, the whole thing, bear in mind, was a hunting preserve, the whole thing including the culti-

vated lands we talked about. They had hunted deer and there was evidence of that everywhere you went.

Q. How much open land is now available since the Government taking?

A. Just the 560 acres of open upland.

Q. Now, Mr. Clark, we have been very much interested in your percentage figures and damage here; when you were testifying as to the first inquiry, you mentioned that the area shown in blue on the map, in your opinion, was damaged 100%; the area shown in yellow 75%; and the area shown in salmon 30% on the first inquiry.

You attempted to explain how you arrived at those percentages, but did you have information as to the flood frequency?

A. Yes, sir.

Q. Would you mind giving us the benefit of that?

A. I thought in that low ground they would probably lose [fol. 327] a crop or a large part of a crop once between seven and ten years, and I figured on the basis of once in seven. Of course, in the year 1940 any crop they had would have been partially destroyed. We had a tremendous flood in Roanoke River in 1940.

Q. The flood frequency on the blue land runs in every seven years?

A. That was just the opinion I formed that it would probably be from seven to ten years.

Q. Would that be flooded before or after the dam was closed?

A. I was talking about before.

Q. Do you have any figures indicating the flooding since the dam was closed?

A. The blue land is flooded virtually all of the time. I don't mean 100% but to such an extent it is of no value.

Q. You contend that even though it is in flood at 100% it is absolutely valueless under the first inquiry?

A. Yes, sir.

Q. And you have no flood frequency basis since the dam was closed?

A. I have been there two or three times, possibly more since last November and I have not seen any of the blue land on any of those trips and I question that I have seen

much of the yellow land, but I think this winter and early spring have been unusual.

Q. The yellow land which extends from an elevation at 302 to possibly an elevation of 320 you have any information as to the flood frequency of those elevations?

A. No, sir. It is very difficult to be sure where I was at [fol. 328] what contours. I am not an engineer, and it is possible that an engineer would have an instrument and identify at what contour he was standing.

Q. I can understand that and appreciate it, but it would be available, would it not?

A. No, sir, it would not because the elevation at the dam doesn't prove a thing except in extremely dry weather, because the water backs up tremendously.

Q. You estimate the damage to the yellow land as being 75%?

A. Whatever I said that is what I think it is.

Q. And damage to the salmon land consisting of 300 acres you estimate at 30%?

A. Yes, sir, that is correct. Those are simply my opinions. I could be mistaken.

Q. If the flood frequency was once in every 65 to 100 years would that change your opinion any?

A. No, sir.

Q. It would not?

A. No, sir.

It is still my opinion. It is like I said in one of these cases before. You take the finest horse—when country people use to trade and fool with horses all the time—and that horse would get in some fence or some little accident and scar a spot in its leg and didn't affect it after it healed up, and you try to sell that horse to somebody and they see that little spot where the hair was gone. In other words, it's a blemish on it. And I think I have been entirely fair in my opinion. You could argue about it for a week and I would still think it. That's the way I feel about it.

[fol. 329] Q. No, sir, my question was not based on your sincerity or fairness, but simply assuming that there was a flood once every 65 years at that elevation would your opinion be different?

A. No, sir, it wouldn't for this reason. That you couldn't possibly give me any such guarantee that I could go buy that

land and it would not flood except once in every 65 or 70 years. The Federal Government as powerful as it is couldn't give me that guarantee. And if it averaged that two or three of those floods might come in the first five years you owned it, and then not have another one for a century and a half. You can't tell about that; that doesn't mean a thing.

Q. Assuming for the purpose of my question that the highest and best use is for a game preserve, in your opinion would there be any possible enhancement of the value of the residue?

A. Now you say this tract——

Q. The 7400 acres.

A. Assuming its best and highest use?

Q. Yes.

A. Of course, it's impossible for me to make such an assumption. The hunting privileges on that land are worth about $200 a month. They have a principal value of about $40,000.00. So you can't assume that would be true because you have been there with your own eyes and seen the timber and seen the other things on it.

* * * * * * *

Testimony of Raleigh M. Felton

Direct examination.

By Mr. Ferrell:

Q. Please state your full name and address?

[fol. 330] A. Raleigh M. Felton, South Boston, Virginia.

Q. How long have you lived in South Boston, Mr. Felton?

A. Approximately 40 years.

Q. What are your occupations?

A. Retail lumber business and contractor.

Q. Are you familiar with land values in Halifax County?

A. Yes, sir.

Q. Are you familiar with land values more specifically in the area of the Falkland Estate which is the subject of this litigation?

A. Yes, sir.

Q. Do you own real estate in Halifax County?

A. I do.

Q. Have you sold real estate in Halifax County?

A. I have.

Q. And have you done so on or about 1952?

A. Yes, sir, and years previous possibly and since that time.

Q. Are you familiar with land values in Halifax County and specifically in the area of the Dan River in the neighborhood of the confluence of the Banister and the Dan River in October, 1952?

A. I am.

Q. Are you familiar with the value of growing timber?

A. Yes, sir.

. . . . . .

[fol. 331] Cross-examination.

By Mr. Hanes:

Q. Mr. Felton, I believe you said that you are in the lumber business now, is that correct?

A. Yes, sir.

Q. Have you ever been in the real estate business?

A. No, sir.

Q. When you go about making an appraisal of property what approach do you use? What method would you use for making an appraisal?

A. Well, I wouldn't say that I have any set rules for making appraisals as you might term it. During the forty years I have been in business it has been my salvation to go out here and buy timber land and buy timber and land in order for the cutting. I've had to do it and consequently from that point of view I have been able to determine what I think is a fair market value for a piece of land or a piece of timber and bid on it.

Q. You have bought timberland, have you bought any farms?

A. Yes, sir.

Q. Have you bought any farms near the Falkland Estate?

A. Not in the immediate vinicity, no, sir.

Q. Have you made any inquiry as to purchases made recently in that vicinity?

Mr. Ferrell:

I object to that as being recently.

[fol. 332] Mr. Hanes:

Q. As of the date of the taking.

Mr. Ferrell:

Well, I just want it to show that.

A. Not a close inquiry, no, sir. I have seen some sales that have been made around the time of October, 1952.

Q. Would you describe them as being comparable with this land?

A. Yes, sir, not in the total acreage, but the land acre for acre would be similar.

Q. Do you recall the price paid for the land?

A. I have seen it vary from $75.00 to $100.00 an acre.

Q. Can you give any specific instance where that has been your observation?

A. No, sir.

Q. You were unable to use comparable sales in making your appraisal?

A. I looked upon this land as I would any other piece of property when I was going out buying timber.

Q. You looked upon this land as primarily a timber tract?

A. Right.

Q. And not generally farming land?

A. Part of it would be timber, and part farm land.

Q. What do you consider the highest and best use of the Falkland Estate?

A. Timber growing and farming.

Q. Which of the two, assuming you have a choice, would you say was the highest and best use.

[fol. 333] A. I would say timber.

Q. What is your understanding of the term "fair market value"?

A. The price that might be obtained for it. I think I am absolutely conservative when I say $20.00 an acre; that I am extremely conservative——

Q. I am sure you are absolutely sincere, but I am trying to arrive at something that the Commissioners can arrive at.

What do you pay for land generally considering the marketable price for farm land per acre? It would depend a lot on conditions under which the farm was sold, would it not?

A. Yes, sir.

Q. You would have to assume that you would have a willing seller and a willing buyer?

A. Yes, sir.

Q. We are interested in the conclusion as to the percentage of damage you arrived. You are familiar with the flood frequency in this area, this Falkland tract and the area which is the subject matter of this controversy?

A. I am not familiar with it from day to day, but I am familiar with the fact that I see water standing there.

Q. When did you go upon this tract to make an appraisal?

A. I couldn't say the exact date, but it was last fall; in the fall of the year. I think probably November.

Q. November, 1957?

A. Yes, sir.

Q. That is approximately five years since the dam gates were closed, isn't it?

A. I wouldn't know that.

[fol. 334] Q. Well, now in preparing for your testimony and for your appraisal of this tract, did you familarize [sic] yourself with the Government's easement that was acquired over the tract? Did you read a description of the easement which the Government acquired?

A. Yes, sir. That is in the instructions that I have from the Court.

Q. Well, what was the Government easement? What was the acquisition in this case?

A. Well, the Government acquired up to 330.

Q. What do you think it acquired up to that contour line?

Mr. Ferrell:

I will have to object to that as a leading question. He has referred to the easement and the easement speaks for itself. It says exactly what it is, no more and no less. He is calling for a legal opinion, or an opinion which involves a legal question from this witness.

Commissioner Weaver:

I don't believe he is trying to call for a legal opinion now. I think he's trying to cross examine the witness as to whether or not he understands the extent of the easement.

Mr. Ferrell:

I was under that impression too that it was an easement over the land up to contour 330. And then the next question was what was his understanding, as I understood the question, of the provision of the easement.

Commissioner Weaver:

Read the last question.

Reporter:

"What do you think it acquired up to that contour line?"

[fol. 335] Mr. Ferrell:

He asked him what did it acquire up to 330 and that is a legal question.

Mr. Hanes:

What I am trying to bring out is this witness' understanding of what he is attempting to appraise under the inquiries. That is a very material part of the inquiries that the witness has some understanding of the rights the Government has.

Mr. Ferrell:

He read them and saw the description and says that is what I appraised.

Commissioner Weaver:

We will let the witness answer that question.

Mr. Ferrell:

Exception noted, please, sir.

A. Frankly, as far as I am concerned I was only concerned with 321 and 330. What the Government acquired

up to 330 I put it on that basis of what they secured or what they bought as I saw it was not a matter for me to determine. I was only to determine what the damages would be up to 330 and what it would be up to 324.

Mr. Hanes:

Q. Now I believe you indicated that you weren't familiar with flood frequencies?

A. No, I'm not.

Q. If we were to assume that between contour line 320 and contour line 330 that one flood occurred every 65 years would that change your appraisal, the land between those two contour lines?

[fol. 336] A. One in 65 years?

Q. Yes, sir.

A. Well, I haven't given that any thought, and actually that wasn't stated in the instructions.

Q. Did you make any effort to find out about flood frequencies over this land, over the blue land?

A. Yes, I have since I was down there last October, not October but November. Since the last part of last November it has been over all practically all the time.

Q. Well, I mean over an appreciable period of time, say ten years, have you familiarized yourself with flood frequencies?

A. No, sir. In this particular case it hasn't been a matter of but six years.

Q. If we were to assume that above contour line 310 and up to contour line 315 that flood frequencies were once every five years, would that change your appraisal?

Mr. Ferrell:

I will have to object to that question as being purely hypothetical and contrary to law because as you know when the Government takes a right to perpetually overflow a certain piece of land in connection with the John H. Kerr dam and reservoir as perpetually and intermittently as maybe [sic] necessary, and that has nothing to do with the frequency of floods in the river. It has to do with the operation of the John H. Kerr dam.

Mr. Hanes:

I don't see how this witness can possibly appraise this land without knowing something about flood frequencies. And the whole purport of my questioning is to find out from him if he took that into consideration.

[fol. 337] Commissioner Weaver:

He answered you and said that he was not familiar with flood frequencies. He stated that.

Mr. Hanes:

All right, sir.

Mr. Lowden:

He said he based his opinion on what he had already seen at the contour.

Mr. Hanes:

Q. Let me ask you this question: suppose you were buying a tract of land down by the river, would you consider it a pretty material item to find out how often that land was flooded?

A. If I were to buy it without any dam?

Q. Yes, sir, just take it by itself without any dam.

Mr. Ferrell:

I will have to object to that because it is completely out of relation to this case. The John H. Kerr dam is there and this case is tied in with the operation of the John H. Kerr dam. It is a hypothetical question and we're getting into the realm of pure speculation.

Mr. Hanes:

I am again attempting to show that before any purpose would be made, or before any appraisal would be made that some inquiry should be made about flood frequencies.

Mr. Ferrell:

Well, I'm trying to say that if the Government wanted to limit it to the overflow as necessary to take care of flood

ing they could have said so in the petition and the declaration and they did not so limit it; and the law is clear that you [fol. 338] take it according to the maximum use that may be made in accordance with the John H. Kerr dam.

Commissioner Weaver:

Will you read that last question, please.

Mr. Ferrell:

Exception noted.

Reporter:

"Suppose you were buying a tract of land down by the river, would you consider it a pretty material item to find out how often that land was flooded?"

Commissioner Weaver:

We will permit the witness to answer the question.

A. If I were to buy a tract of land, and no dam such as the Kerr dam was erected to have any control over it, of course, I would take my chances as all people who have lived in Halifax County or the State of Virginia, or wherever they might be, would take in buying that land. Certainly if I was to go down by the river and buy a piece of land now, I certainly would take into consideration what would be the flowage as a result of the backwaters of the John H. Kerr dam. I would be foolish if I didn't.

* * * * * * *

Q. What was the principal income producing activity of the Falkland Estate in 1952?

A. Farming was the general thing and also the selling of timber I think.

Q. At least you got that impression?

A. No, I know as far back as 1952. The evidence is prima facie there were 20 acres in tobacco, and I am ac- [fol. 339] quainted with the farm manager of the Falkland Estate and have known him for the past forty years, and know also that he farmed the bottom lands to some extent, to what extent I couldn't say. That would be hearsay on my part.

Q. You mentioned the white land on the map is 20% depreciated under your first inquiry?

A. Yes.

Q. How do you arrive at that 20%?

A. You take the number of fingers that run up in there, some flooding, and it is not as easily [sic] to travel from one section to another as formerly, and it also eliminated the fact that you could have or would have the bottom lands to help support the 5560 acres. Just the general depreciation of the whole farm when that amount of stuff is taken away from it.

Q. You mean to say that the entire white acreage has depreciated 20% because of the high water backing into these fingers that reach up in there?

A. I would think so as the resulting conditions after the taking.

Q. Does that mean that the use of that white land—what I am trying to get at is how you get at the 20%? The use of the acreage left is that restricted 20%?

A. That is what I am trying to say due to the fact that you're taking away the accessibility to the rest of the land that amount.

Q. How often do you expect the water level to be up to the 330 contour?

A. I couldn't tell you that. The only assumption—not [fol. 340] the assumption, but if the Government or the John H. Kerr Dam want it up to 330, I assume they can put it up any time they want it if the rainfall is sufficient, and they have a perfect right to do so.

Mr. Hanes:

I move that answer be stricken from the record because that is a legal conclusion.

Mr. Ferrell:

I want to read from the transcript and put it in the record right here of this case on January 18, 1954. Mr. Miller said this on page 99:

"Plaintiff offers to prove that the John H. Kerr Dam, formerly Buggs Island Dam, as now constructed is designed and constructed and susceptible to flooding permanently

only to elevation 300 feet mean sea level. That as the dam is now constructed and designed and completed, it is capable of flooding only to contour 320 mean sea level.

"Plaintiff also offers to prove the frequence of the flood between those two elevations, that is, 300 and 320 feet mean sea level.

"Plaintiff further offers to prove that the only effect on the land above elevation 320 feet and up to contour 330 will be during certain floodings by reason of back water to increase the elevation of the natural floodings during periods of floodings.

"As I understand your Honor, that offer of proof would be rejected?

"The Court:

"Yes, sir."

So it was rejected on January 18, 1954: they assigned it as error to the Fourth Circuit; and the Fourth Circuit ig- [for. 341] nored the assignment of error, and since that time —not four years, yes it has been over four, they have never made another tender or offer of proof, or even suggested to the Court before these inquiries were directed to the Commission that there would be any such testimony or any such limitations, so we say that all of this questioning along the lines that he has previously indicated is irrelevant, and immaterial and contrary to the law of the case as determined by the Court. And they have never objected or excepted beyond this proof here, but they have never tendered it again, so we say that's out as far as this case is concerned and has no relevancy at all to this inquiry.

Mr. Hanes:

Gentlemen, I would like to say that Mr. Ferrell is certainly thoroughly versed with what's occurred in the previous hearings in this matter and the law of this case. But the whole purport of my examination here is to try to find out from this witness how he arrived at a 20% depreciation of the white land.

Now, he has told us that he doesn't know how frequently this area is flooded, the salmon area or the yellow area. Yet

he has come to the conclusion that that is a restriction of use 20% on that white area. Now, I don't believe that the Court's rejection of that offer of proof violates the purport of what was intended by the Court's rejection.

Mr. Ferrell:

I misunderstood you because you asked him how he could value—I will go along with you.

Mr. Hanes:

I don't understand your point at all. The objection you took was taken out of the preceding transcript.

[fol. 342] Mr. Ferrell:

I object to that.

Mr. Hanes:

I don't understand. I think my cross examination is material.

Mr. Ferrell:

It is hypothetical and contrary to the reling of the Court when he talks about damages to the residue. I still think he should go one step further. I made my point as clear as I could. That is not a question about the damages to the residue.

Mr. Hanes:

That is to show that the salmon area of land here—how often this witness expects this salmon area to be inundated so that access cannot be had across there. He expects it to be 20% of the time.

Mr. Ferrell:

Object to that.

Mr. Easley:

Even the Federal Government can't tell how he arrives at the 20% damage to the residue.

Mr. Hanes:

That is the whole purpose.

Commissioner Weaver:

The witness said that was the result of this overflowing as shown on the map. That was his answer.

Mr. Hanes:

If the Commission is satisfied that will take care of the situation.

That concludes our cross examination of this witness.

[fol. 343] Redirect examination.

By Mr. Ferrell:

Q. Did you ever get down on the land that is colored blue on that Government Exhibit 2 looking for sand?

A. Yes, sir.

Q. When was that?

A. Twenty or twenty-five years ago.

Q. When you went down there 20 or 25 years ago looking for sand did you find any?

A. No, sir.

Q. What kind of land is it?

A. Good rich soil down there.

Q. Mr. Felton, in making your appraisal of the damages did you take into consideration what you had actually seen on this particular property?

A. Yes, sir.

Q. Do you know of any other land, more or less, comparable to the entire 7400 acre tract in Halifax County as the Falkland tract?

A. Nothing comparable to that size, Mr. Ferrell. There is other land owned by Mr. Walden that had bottom land and goes on the same waters. That is about all I know of. Nothing to the extent of the Falkland Estate, if that answers the question.

Q. Was the Walden property sold about 1952?

A. It has been sold since that time.

Q. When was it sold?

A. Around about six months ago.

[fol. 344] Q. Would you say land values six months ago would be anywhere comparable?

A. Not too much change in it, Mr. Ferrell. Not that short space of time, six years, I wouldn't think too much change.

Q. Did you consider that sale in the facts and circumstances as one of the factors in arriving at your calculation of value?

A. I didn't. I looked on the land from the timber standpoint, tobacco acreage and what the land was worth.

Q. It is more based on your experience than any particular sale?

A. Yes, sir.

Q. Your experience in buying property has been how many years?

A. About forty years.

Q. And dealing with property in Halifax County?

A. Yes, sir.

Q. And on the Dan River and Banister and Hyco River?

A. Yes, Hyco particularly.

Mr. Hanes:

I would like to renew my motion to strike as to the 20% damages to the residue. He has submitted that he does not know anything about the flood frequency in so far as they affect these fingers.

Commissioner Weaver:

It goes to the weight rather than to the admissibility and I overrule your motion.

[fol. 345] Mr. Hanes:

Exception.

Commissioner Weaver:

I understood you to say in answer to question on cross examination that you first went on the Falkland tract to view it in November, 1957, and that your fignres were based on what you saw on November, 1957, but you related your values back to 1952, is that correct?

A. The values I placed related back to 1952. The question you gentlemen asked me was when I made my figures. I

viewed it in November, 1957, but didn't compile my figures until 1958.

Q. I understood you to say you related your values to 1952?

A. Yes, sir.

Q. You didn't go on the property in '52, 3, 4, 5, or '56 so far as this estate is concerned?

A. I have been on the Falkland Estate several times maybe two or three times in one year, and maybe miss a year, but I have been on it frequently since I have been in Halifax County for various purposes.

Mr. Ferrell:

Q. Mr. Felton, you were not employed by us to make this valuation until November, 1957, were you?

A. That is correct.

Q. This view you referred to was shortly after you were employed?

A. Yes, sir. I made a visit in November, 1957, and also went back the 14th of May, 1958, and made another view of it.

[fol. 346] Recross-examination.

By Mr. Hanes:

Q. Would you tell the Commissioners what the elevation of water appeared to be when you were there in November, 1957, and when you were there in May, 1958?

A. In November around the lower part of the map we could walk out to some of the blue land that did not have water on it. However, we saw evidence, very recent evidence that it had been up on the main land and you could see across the fingers mud way up. In May when I was down there to view it there was water well, up pretty close to 315, if not a little higher, but I would not have an estimate, but it was up plenty high that day.

Q. There was considerable discrepancy as to the elevation of water between the two times?

A. Yes, but not any discrepancy as to the evidence of the water there.

Mr. Hanes:

That is all.

Witness stands aside.

. . . . . .

Testimony of Ernest L. Munger

Direct examination.

By Mr. Eafsley:

Q. Will you please state your name, age and address?
A. Ernest L. Munger, 39, Halifax, Virginia.
Q. What education have you had?
[fol. 347] A. Forestry.
Q. And where were you educated?
A. North Carolina State College.
Q. And how long have you been engaged in the job of forestry?
A. About 13 years.
Q. And you are now the manager of the Falkland property, are you not?
A. Yes, sir.
Q. How long have you been the manager?
A. This is eight years.
Q. Eight years?
A. Eight seasons, seven years altogether.
Q. And you have known the Falkland property for how long?
A. Intimately for seven years.
Q. What is the operations down there on the Falkland property, what's being done to that property?
A. Engaged in farming and timbering.
Q. Is there any game?
A. It has been operated as a game reserve.
Q. For how long?
A. Since 1925.
Q. What game do they hunt down there?
A. Mostly deer and turkey.

Q. Mr. Munger, I want you to look at that map, which is Exhibit 2, you know the different types of soil indicated by the blue, yellow and salmon land?

[fol. 348] A. Yes, sir.

Q. What is the nature of that blue land?

A. The water covers it usually in the Spring flood. The merchantable timber has been cut and now it is mostly mud during the summer.

Q. Is that land susceptible to cultivation now?

A. No, sir, it is covered with water so much, and as soon as the sun hits it if the water goes down it starts cracking.

Q. Then it is no good for agricultural purposes?

A. It is no good for anything now.

Q. Is that a permanent condition?

A. It is now, yes.

Q. So that that land is entirely ruined?

A. Yes.

Q. Go up to that yellow land, is that bottom land?

A. Yes, most of that is in bottom land, a few little ridges and a drainage canal.

Q. What is the condition of that soil?

A. It is more marshy due to the fact that water stands up there more during the Spring of the year than before. This Spring that bottom was almost completely covered for two months and still has high water all the way up.

Q. What is the value of that land for agricultural purposes?

A. It is almost valuless [sic], but still some value for timber.

Q. What kind of timber will grow there?

[fol. 349] A. If the flood is up for any period the gum is gone.

Q. What has been your experience with water there for the past several months?

A. We have had so much water that I have not been able to work up where the yellow is now, and I am still not able to get across there now.

Q. You know how high the water is?

A. 315 feet.

Q. You know where the markers are on the contour lines?

A. I know where four are.

Q. What effect does the water have on that salmon land?
A. Water has never been that high.

. . . . . .

Cross-examination.

By Mr. Hanes:

Q. Mr. Munger, I have profound respect for you as a forester. I was down there yesterday and saw the work you have been doing, and the question I am going to ask you relates not to your qualifications as a forester, but as a land appraiser.

Mr. Easley asked you if you were born on a farm and had any experience in real estate transactions, but you mentioned you had taken a course in real estate in college.

A. And land soil appraisal.

Q. Did that concern the value of lands?

A. Yes, sir.

[fol. 350] Q. Would it say what type was worth such and such and what type was worth less?

A. Yes, it did.

Q. How did you apply that as to the valuation of this farm?

A. I classified it mostly on the soil type, and only that bottom with the silt loam is the most valuable.

Q. How often was that bottom land flooded before the acquisition of October 23, 1952?

A. I would have to base that on the timber, it averaged every eight to ten years.

. . . . . .

Q. The yellow land depreciated in your opinion 75%, and yet I believe you mentioned that some timber could still be raised on that land. As a matter of fact there has not been any change in the character of timber that can be raised on that land?

A. I believe there has.

Q. What type could you raise there now?

A. Pine.

Q. Is that the only type that can be grown on the yellow land?

A. Yes.

Q. How do you arrive at that figure?

A. Constant flooding there is a decrease in the growth of the trees. It is flooded during most of the growing season. [fol. 351] Q. I can understand this year that there has been considerable flooding, but what about the past eight years?

A. There has been water up there every year, but it has not stood as long as it has this year.

Q. This year you have had more precipitation than any year you have been there?

A. Yes, sir.

Q. Let's take last year, how long did water stand up in the yellow area?

A. Most of it was covered some about a month altogether.

Q. In order for it to be depreciated 75% in value because you can't plant pine in there, and assuming that the water covered it a month out of twelve months, I still don't understand how you arrive at 75%?

A. The decrease in the growth rate and the cost of logging.

Q. You estimated the entire 7400 acre tract as farm land and that it had depreciated 15%?

A. Not much farm land there.

Q. How much is left as farm land?

A. I don't know.

Mr. Hanes:

That is all.

Mr. Ferrell:

No further questions.

We rest.

Witness is excused.

. . . . . .

[fol. 352] COLLOQUY BETWEEN COUNSEL AND COMMISSIONERS, AND ARGUMENTS

Mr. Lowden:

I would like to put in this record your objection this morning. The record should show that Mr. Armistead Harvie

has been bedridden and unable to move for six months and is unable to move today, and I would like for the record to show that he would be unable to come here to testify today.

Mr. Hanes:

I have an offer of proof to make that is outside the scope of inquiry and instructions and it relates to a settlement with the fee owner of this land. I would like for the record to show and set forth the letters that led up to this settlement with the fee owner.

Mr. Ferrell:

I would object because it is not only irrelevant and immaterial but contrary to the Court's instructions, and I want to go on record to say that before this Commission it is highly prejudicial and almost bordering on contempt of Court.

And furthermore, that if it is to be considered in any respect as an offer of proof or even looked at in that light, we want the opportunity of presenting the true facts through Mr. Easley, who was involved in those proceedings, and point out that at the prior hearing we offered Mr. Easley as a witness to go into that matter. The Government represented by Mr. Miller objected and the Court sustained his objection, and since that time the Fourth Circuit Court set out some letters, and the Government had the audacity and assumed as facts certain things that were not facts, and if you want it I can give you the answer to the [fol. 353] Government's motion that talked about this thing that showed how irrelevant and immaterial it was. I don't think it is proper and I don't think any consideration should be given it in this case. It is not pertinent to these inquiries and Mr. Hanes can take it up with Judge Paul. He had the opportunity and he alluded to it, and that is why the instructions were asked for and given by the Court as to the facts and circumstances as to who owns what was not relative to this inquiry.

Mr. Hanes:

Insofar as this hearing is concerned it is certainly not my thought that the evidence should be received on that ground, but I would like for the record to show that I am making an

offer of proof at a later time before Judge Paul, and would like for counsel for Virginia Electric & Power Company to know so that they can make an offer at that time. I want the record to show that we wish to make it in the future.

Mr. Ferrell:

Then you don't make an offer to this Commission?

Mr. Hanes:

This is my reason for raising it at this point. I want to give you an opportunity to object to it, and you have stated your objections. I certainly don't mean to make an offer in the face of the instructions, but I want to reserve an opportunity to make it when Judge Paul has another hearing on this matter in the future.

Mr. Ferrell:

I will take the position at that particular time not only on the grounds previously stated, but on further grounds before Judge Paul for other reasons.

Mr. Hanes:

Yes, I understand you have waived it.

[fol. 354] Commissioner Weaver:

You offer what?

Mr. Hanes:

I am not making a formal offer of proof. Were it not for the instructions of the Court and were it not for the phraseology of the inquiry as directed by Judge Paul, then I should like to introduce into the evidence certain evidence relating to settlement with the fee owner. Certainly it is not my thought that you gentlemen should take that into consideration at all. But I don't want anyone to infer from my silence that I am going to waive any right to make that offer at a later date.

Commissioner Weaver:

There is nothing for us to pass on in that connection. Your statement is in the record but you have made no offer.

Mr. Hanes:

The Government rests.

Mr. Ferrell:

We have agreed, I thought, that the general statement on the bottom of the first page is erroneous, and it should read:

"That inasmuch as the landowner with the consent of the Government has sold all of the growing timber on tract FF-3100E up to contour 302, plus or minus, and the same has been cut, you should not include the value of such timber in making your determination of inquiries set forth in the order appointing you Commissioners."

Mr. Hanes:

I agree that that is all right as far as it goes, but I think we should also show—if you prefer—I think you know what I'm going to say—out of the hearing of the Commissioners.

[fol. 355] Mr. Ferrell:

You mean the contract?

Mr. Hanes:

Yes.

Mr. Ferrell:

The suit on the contract, and it was settled. That's why I used the words "plus or minus". You go ahead an[d] elaborate.

Mr. Hanes:

I think that we should also show that in May, 1953, Mr. James S. Easley, as attorney for Olive Vaughan Williams, brought suit against Stanley Land and Lumber Company for a claim of $2,533.95 for timber cut by this company beyond the boundary of the contract, giving them the right to cut all merchantable timber between the "boundary of the line established by the Army Engineers" by survey made in the months of June and July, 1950, marking the limits of the permanent power pool. That on the trial of this suit the claim was settled for $1,856.56.

In view of my statement a few moments ago I believe I said that I wished to make an offer of proof. May I withdraw with consent of counsel the statement that I wished to make an offer of proof. What I meant to say was I did not wish to waive any right to make any subsequently.

Mr. Ferrell:

The way you went into it with this Commission I think the record ought to stand just like it is. You certainly said more. I'll admit that you later on changed your mind and stated it differently. You stated that—what got me a little more or less incensed was your statement calling it an offer [fol. 356] of proof. I wouldn't have gotten upset if you had said that sometime later on you wanted to take up something with the Judge. I want to take up something with him too.

May the Commission please, I know the procedure is that since we had a right to open and close we have the right to make the opening and closing statements.

Our personal view at this end of the table that it's unnecessary for us to argue this case. We have gone into it as carefully as we know how. We will do it if the Commissioner wishes us to.

We also submit that if we don't open Mr. Hanes can't argue in rebuttal. I don't want to cut him off either, but I would just like for the Commission to indicate to us what they want and what they don't want, and we will comply regardless of our own views. After all the lawyers are supposed to help and not deter the Commissioners in making their determination of these four inquiries.

Commissioner Weaver:

The Commission takes the position that if counsel for either side, the property owner or the Government wishes to argue the Commission will hear it, either or both.

Mr. Ferrell:

We will waive the opening statement and see what Mr. Hanes wants to say and then we'll try to close it, if that is agreeable with the Commission.

Commissioner Weaver:

That is agreeable.

Mr. Hanes:

Gentlemen, all that I am going to say, and I think all I can say under the inquiries and instructions, is by way of [fol. 357] explaining or attempting to explain to you why we have not put on any evidence.

It is our contention that the easement that was acquired by the Government in this case is so closely connected with power site values, that when power site value is excluded as the inquiries direct, that the value, the damage done is nominal only. That we have felt that should we put on evidence of value it would be in the face of the theory that damage done was nominal only.

I realize that this is a very complexing situation to you gentlemen and wish that I could assist you more by way of clarification, but you've already heard the discussion that we've had about one statement that I made, and I hesitate to make any more for fear that it may be construed as going outside the bounds of our instructions and inquiries, which I certainly do not intend to do.

Mr. Easley:

I have been amazed all day, and I am certainly amazed now to hear that after we brought the evidence here and based our entire case on uncontradicted testimony, that the value of the Government taking which has been acquired by this power company covered nearly 1840 acres of valuable land, and that the damage that had been done was the taking from them the rights they purchased on this land and say that there was nothing but power operation there. There has nothing been said about power operation.

You gentlemen know, and I know Mr. Weaver does, that the only thing the law doesn't permit you to do in the case of navigable stream is to get anything beyond an agriculture value. You can't say this is a good place to build a dam therefore we owe you X dollars for that. Nobody ever appraised anything like that; nobody asked anything like [fol. 358] that, and that's not in this case.

We base our whole case that the power company had the right to—was to absorb or take from us the right which we

purchased to use these lands for a power company, which transferred that much, and the Court has held that it does. But this inquiry here directed by the Judge was to ascertain these four issues, which we've done. What else is there to do? Except for you gentlemen to find out what the answers are from the evidence which is undisputed, and answer to the first, second, third and fourth questions that the Court has submitted to you, and give the Court the figures and then the Court passes upon the legal aspects of it as to what is the amount of money due the power company from the Government for the rights which they have taken. The power company site, the power company value has nothing to do with it.

Now, here again this 850—650 acres of land which the undisputed testimony says is absolutely destroyed, not for power company value, but for value as a farm and the operation of that timber business. But to say that the whole thing must be stricken out because the thing that we're seeking is power company sites is to deny the very thing the Court sent you here to determine. So I don't see anything to do except to apply the rule and the order of the Court and to assess the damage in accordance with the undisputed testimony that is here, and reconcile any difference between the two and establish the figures and the report which the Court wants you to make and then based upon those the Court will determine the final judgment is my understanding.

Commissioner Weaver:

The opinion of this Commission that the instructions that [fol. 359] it has received from the Court is short, precise and clear, and confines the functions of this Commission within very narrow limits. The last paragraph of these instructions reads as follows:

"In making your determination of fair market value you should disregard the fact that Virginia Electric and Power Company has a perpetual flowage easement over some of the land involved in this case, and that the owner of the fee, Olive Vaughan Williams and the United States, made an option contract dated April 30, 1951.

"And you are further instructed that you should not at-

tempt to determine the value of the respective interest of the owner of the fee or of such flowage easement."

The Commission feels from that language, and it is confined to establishing values here, regardless as to who may fall heir and receive these values. Inasmuch as the Government does not put on any testimony it would seem that the Commission will be restricted to the testimony offered by the defense and perhaps such ideas of valuation as it may have acquired from personal observation of the property.

NOTICE OF FILING OF COMMISSIONERS' REPORT—
Dated June 19, 1958

To: Hunton, Williams, Gay, Moore and Powell, Attorneys at Law, Electric Building, Richmond, Virginia (Attorneys for VEPCO) Leigh B. Hanes, Jr., Assistant United [fol. 360] States Attorney, Federal Building, Roanoke, Virginia (Attorney for plaintiff).

Notice is hereby given you that the commissioners heretofore appointed in this cause have this day filed their report herein.

Dated: June 19, 1958.

C. E. Gentry, Clerk. By (S.) Grace A. Harper, Deputy Clerk.

MOTIONS TO ADOPT REPORT OF COMMISSIONERS AND TO AWARD COMPENSATION TO VIRGINIA ELECTRIC AND POWER COMPANY. —Filed July 5, 1958

The defendant, Virginia Electric and Power Company moves the Court (1) to adopt the report of the commissioners, appointed by the Court in the above entitled proceedings by an order dated May 1, 1958, which report was filed with the clerk on June 19, 1958, and (2) to award compensation to Virginia Electric and Power Company in conformity to the provisions of the judgment in this cause of the United States Court of Appeals for the Fourth Circuit, all of which more fully and at length appears from the

opinion of the United States Court of Appeals dated July [fol. 361] 31, 1956 (235 F.2d 327) and the mandate of said Court.

Virginia Electric and Power Company. By (S.) Ralph H. Ferrell, Jr., Counsel.

Ralph H. Ferrell, Jr., Frank V. Lowden, Hunton, Williams, Gay, Moore & Powell, 1003 Electric Building, Richmond 12, Virginia. James S. Easley, Easley & Vaughan, South Boston, Virginia, Of Counsel.

Certificate of Service, (omitted in printing).

[fol. 362] In United States District Court

Excerpts from Reporter's Transcript of the Hearing Before John Paul, District Judge, Harrisonburg, Virginia.—November 24, 1958

Colloquy Between the Court and Counsel for Vepco

The Court: What is the matter here this morning, Counsel?

Mr. Ferrell: May the Court please: As we understand it, the only questions proper before the Court at this time are, first, the adoption of the Report of the Commissioners, which was filed with the Clerk on June 19, 1958, to which Report no objection has been filed; and the second is: the awarding of compensation to Virginia Electric Power Company in conformity with the Opinions of the United States Court of Appeals for the Fourth Circuit, on July 31, 1956, and September 11, 1956, and the mandate of that Court to this Court.

However, on November 15th—I believe that is the correct date, at least date of the motion—the government filed a motion in this case to exclude from the compensation to be paid to VEPCo, residue as determined by the Commissioners; and they have filed, also, an offer of proof, and, as we understand it, they allege VEPCO has no interest in the residue of the land, and, they say, this offer of proof will show that to be the fact.

Also say—aside from the government's motion—the importance of the things they want to prove this morning is proper because it was reflected in the observations of Your Honor, and also in the mandate of the Court of Appeals. We disagree, entirely, with that.

We say that it is immaterial and irrelevant, as a matter [fol. 363] of law, under the decisions of the Fourth Circuit; and in addition, we say, even if you went into it, it is inconsistent with the government's previous position in the hearing on January 18, 1954, before Your Honor, at which time they were prepared to, and they objected, and were sustained, and was inconsistent to their position all along in the case;—The option agreement speaks for itself; immaterial as a matter of law, because these were preliminary matters, prior to the execution of the option agreement; the option agreement states nothing the government represents, doesn't appear in the option agreement; the option agreement represents a complete understanding between the parties.

However, we have always taken the position, may it please the Court, that their interpretation of all these preliminary negotiations between the parties is entirely erroneous as a matter of fact, and, while we don't want to waive our objection and exception, this case has gone on so long—and they intimate it is going to keep on longer—that we would like very much to at least end, as far as possible, at this level all the evidence, taking of evidence on any matter anybody thinks could possibly be material to this case.

So, without waiving our objection, we would suggest to the Court, to get the matter disposed of here, that we go ahead and let both sides put in all the evidence they want to put in. I don't think it will take very long, on this particular point. Then we will make a motion to exclude it, to strike it, and if the Court agrees with that, then we have disposed of it, or maybe Mr. Lowden and my children will try this case if some court sends it back to take evidence on this fact, if our adversaries are correct, but we can't see it, at all.

The Court: Mr. Ferrell, what you have said doesn't help me in understanding this case. I can't keep all these cases

in mind from year to year. Is this the same altercation we had down at Danville?

[fol. 364] Mr. Ferrell: No, sir. I will start at the beginning:

This involves the VEPCO flowage easement over the Falkland tract.

The Court: I was under the impression this was the situation: I thought what we had before us here, as you say, was the value of the VEPCO's flowage easements in this certain land. I understood VEPCO had acquired flowage easements covering a considerable tract of land, a considerable portion of this tract. Now the government has gone in there and built this Buggs Island Dam, which took your flowage easement, or took the land over which you had the flowage easement, and that you received compensation for that.

Mr. Ferrell: That is right, sir. And on January 18, 1954, at Roanoke, we had a hearing on values, and we had no jury, it was submitted to the Court, and at that time the theory was that inasmuch as we had perpetual flowage easement over 6,199 acres; that the measure of damages would be the fee value for agriculture and grazing and timber purposes, excluding timber, and Your Honor agreed with our view in the case; their position being, owned by the United States, which rendered our VEPCO's flowage easement, permanent or perpetual, valueless; Your Honor disagreed with that. You held that they conceded we had a property right; and you awarded two valuations, put on by VEPCO, on which the government did not offer any evidence, as to values.

That went to the Fourth Circuit and the Fourth Circuit affirmed Your Honor.

And then the government petitioned for certiorari and it went to the Supreme Court of the United States and, right after the decision by the Supreme Court of the United States, in the *Twin Cities case*, which I believe was in [fol. 365] January, or a month or so later, the Supreme Court vacated, in our case, the VEPCO case, which we call the 'Falkland case,' they vacated the judgment of the Fourth Circuit and remanded the case for reargument, in the light of the decision of the Supreme Court of the United States in the Twin Cities.

So it went back to the Fourth Circuit, was reargued there, and the Fourth Circuit again held: first, we had rights that were compensable; and we tried to argue, and it is set forth in the Opinion, that since Your Honor had valued our easement right without reference to water power value, that the previous valuation should stand, and final judgment entered for that amount, and the Fourth Circuit said 'No,' because this is interim [sic] proceedings and the way we have to find this thing out, value of VEPCO's interest, disregard the interest VEPCO has, the United States is condemning a different type of easement—the case you heard originally in Danville—that we don't use all those rights——

The Court: (Interrupting) Yes.

Mr. Ferrell: (Continuing)—and said it doesn't necessarily follow in the VEPCO case, because the element of confusion is the VEPCO easement, that VEPCO's easement transfers the right of the government's easement to VEPCO.

They disagreed with us, sent it back to Your Honor and said, in this proceedings, we argued this before,—and Your Honor held with us—we disregard the different ownerships, and we value the easement the government is condemning over the entire Falkland tract of 400 acres, part of which is covered by the government's easement, and then we will get that 'X-dollars' and then decide later how much of that compensation belongs to VEPCO.

[fol. 366] Now the Fourth Circuit did say 'Pay it all to VEPCo.' Just taking it literally, you could properly argue, value fixed by the Commission for the government's easement should come to VEPCO because of the destruction of its easement.

We have prepared a Memorandum of Argument, we have put on Your Honor's desk, which, we submit, is in keeping with the second decision, or rather, the third decision in the Twin Cities case by the Fourth Circuit, which came down here in 1958, because, you see, in the Twin Cities case it was remanded again, and they had the flowage-right problem, among others, and we tried it on the basis of flowage rights, and they did it on the basis of flowage rights, and it went to the Fourth Circuit because the District Court said:

'I am not going to allow them anything,' and the Fourth Circuit said 'You have to do it.'

The government applied for rehearing. We have the decision here, per curiam opinion on the Petition for Rehearing, we think vital in point insofar as their argument on the motion. The Supreme Court of the United States, just this year —I believe it was this year—denied their Petition for certiorari, in the Twin Cities, in which they held flowage rights compensable, cited as sole authority, in the Twin Cities case, for their decision in this case, and said: they held those the true and proper measure of damages. In rem proceedings, you fix the value, as far as the government is concerned, for its easement, and determine how much right the power company, what share of that award is properly payable to the power company.

The Court: Now this Commissioners' Report here, that which is an alternative Report, cover several aspects does it not?

Mr. Ferrell: Yes, sir.

[fol. 367] The Court: Now that is supposed to represent the value of the government's easement?

Mr. Ferrell: Yes, sir. The first one. The first one is the government's easement, without consideration o[f] anything else, may the Court please.

(Indicating on map) Here is the tract of land, as we call it, the 'Falkland tract' with the brown lines around it. The colored areas are the 1840 acres up to Contour 330, that the government's easement involves, either permanently or intermittently. And that is it.

Of course they have rights of ingress and egress. The government condemned those and was necessary for the maintenance of the pond behind the dam. (Pointing out on map)

Now that is the first inquiry.

Now the second inquiry is the one we suggested, because we thought that would give the Court a fair yardstick in apportioning the valuations established by the Commissioners for the government's easement; and I tried to put this over in the Fourth Circuit, but did not: VEPCO's easement, by stipulation in this case, only goes up to Contour 321, instead of 330, and of course ours is perpetual and only involves 1540, the second inquiry only takes that into con-

sideration; just the value of the government's easement, as if it only went up to Contour 321; and then we could see how much of the total should be paid to VEPCO, despite the language of the Court, which could be interpreted to mean we 'could get it all.'

The Court: Who is the government supposed to pay for the easement taken?

Mr. Ferrell: They have settled with Mrs. Vaughan, to pay her for her rights, which they say now is a little differ-[fol. 368] ent from what they said in the previous hearings before this Court, and in the Briefs they said 'We paid her one dollar for increased servitude over VEPCO's because they have intermittent flowage rights over this red area. (Indicating on map)

The Court: And not to pay, not supposed to pay VEPCO anything? Is that the government's idea? And they took, they get flowage easements over 1840 acres, for 'one dollar?'

Mr. Ferrell: For 'Two Dollars,' one to Mrs. Vaughan and one to us, and they argued before the Commission, we referred to in our Brief, they extended this doctrine of the flowage easement being valueless, because of the paramount servitude of the United States Government to include the valuation of the land, itself, because, before the hearing before the Commissioners, or at the hearing before the Commissioners on these inquiries, they did not put in any evidence, and, next to the last page say: 'We take the position because of our right to build the Dam, you exclude water power value and the land, itself, is only worth a nominal amount.'

That is what we are up against. That is the way I understand the issues. We knew this case would be very complicated because every time, they get a new lawyer on the government's side, they think of a new theory and don't go back and look at the positions previously taken and their 'reprobates' and 'approbates' are so inconsistent, we hardly know what is going on, ourselves.

We have been following this thing for six years.

I don't know if Mr. Hanes will be the final lawyer for the government, or not. We want to get the thing settled, and we don't think it is worth—we want to get it settled.

[fol. 369] The Court: I certainly want to get it settled.

Mr. Ferrell: We have come here and given Your Honor the complete record in the case: we did not have enough of them; I had to borrow what you have on your desk from the Clerk of the Fourth Circuit; he didn't have the Petition for Certiorari by the United States Government, and our Brief in opposition; and also have on Your Honor's desk Memorandum of Argument, in which we say, we think —we prepared it very hastily; we didn't know about this motion until last Saturday, and as Mr. Lowden and I were previously committed until Thursday morning, we did as best we could to make a Brief, chronologically, of our position in this case and our position is, taken on both these points, show they are incompetent, irrelevant and immaterial, but he seems to think that the Fourth Circuit is interested, or the Supreme Court of the United States might be interested in all this business, what happened between the land owner, Mrs. Vaughan, and the government, and while we don't want to waive our objection, we do strongly object, but let's get it over, hear all the testimony, and then decide what is to be done.

Now I want to explain about the second and third inquiries in the Commissioners' Report. You will recall we had one conference on the Order referring this matter to the Commissioners and at that time the Governmenf indicated, 'Oh, no, it isn't the tract of land Mrs. Williams owned was meant by the Fourth Circuit in its mandate: they were referring to the 1840 acres, and even less than that—1840 acres'—they said 'they are talking about the 1540 acres, over which you have flowage rights. There, again, they said exactly what they are saying this morning. So to get it over, so it will not have to come before the Commission again, on inquiries based on those factors—and we didn't [fol. 370] tell the Commissioners that was because the VEPCo only had the flowage rights, as distinguished from other rights over the 1840 acres, or the government was only taking 1840 acres for its flowage rights. The government, disregarding ownerships, they are condemning 1840 acres out of [4]700 acre tract.

So we said 'Just forget it and we will have the inquiry made that way,' but to save time we submitted to the Commission the 1540, as if the government's easement had only been on the 1840 acres, but we feel those answers are irrele-

vant and immaterial, and just put in there to keep them from having this thing go back to another Commission.

COLLOQUY BETWEEN THE COURT AND COUNSEL FOR THE UNITED STATES AND GOVERNMENT'S EXHIBITS

The Court: What is the government's position?

Mr. Hanes: If the Court please, I would like to say, at the outset, I can certainly appreciate the feeling of the Court and of Counsel for VEPCO as to the continued litigation in this matter, and I will say that I think, I hope that it will soon be put to rest: at the same time—despite the inconvenience that is being caused to everyone, we feel very strongly that the principal issue in the matter has not yet been coped with and that is to say, what the VEPCO could lose by this condemnation?

Now Your Honor will recall, at the outset, that—and I believe this has been admitted—Virginia Electric Power Company did not have an integrated power site, had some piece-meal acquisitions in the area, but at no time was there a complete integrated power site. It does have theoretical rights and they were 'theoretical' only because of the government's servitude in a navigable stream.

[fol. 371] It has been the position of the government, as Your Honor will recall, in view of these factors, VEPCO, itself, had only a paper right. Now the government, at the outset, settled with the owner of the fee; the settlement, as I understand it, was perfectly satisfactory with the owner of the fee. At the hearing—

The Court: (Interrupting) On what basis, financial basis, did they settle?

Mr. Hanes: We hope to show today, at the request of the Attorney for the owner of the fee, the government took a less interest than it had originally intended to take in this area, and that the Attorney for the owner indicated, when making that request, that advantages would inure to the owner of the fee, if the request were granted, and pursuant to that request the government did take less rights than it had intended to take, and that it was the policy of the government to take, in that area.

The Court: But that doesn't answer my question. I asked you how much you paid the owner of the fee?

Mr. Hanes: We paid them a nominal consideration: One Dollar, plus the other consideration, which we hoped to bring out in our evidence, involved in our offer of proof, if Your Honor will permit it?

The Court: You know, very well, the owner of the fee wouldn't have taken 'a dollar' if they had not already parted with the flowage rights to the 1500 or 1840 acres of land. 'One dollar' didn't compensate them for losing that; they had parted with that to VEPCO, presumably for valuable consideration.

Mr. Hanes: That has never been shown, throughout these proceedings.

[fol. 372] The Court: It doesn't matter what VEPCO paid, VEPCO owned the flowage rights over that acreage, and the owner of the fee knew it, or would never have taken the 'One Dollar,' because they had already parted with the thing, taken for the Dam, for the Reservoir.

Mr. Hanes: I am at a loss to know what the motives of the fee owner were, in accepting this option. Now we feel that the motives were not relevant to the matter of their actual acceptance, which was made pursuant to their Attorney's request.

The Court: You say 'the option.' What was 'the option?'

Mr. Hanes: We had hoped to go into that, if Your Honor will permit this 'offer of proof?' We have that attached to our written 'offer of proof' as 'Exhibit No. 4.'

Mr. Ferrell: It is already in the case, printed in the Opinion, right in the back of it. I have forgotten the page number. We are so short of copies here.

Mr. Hanes. (Indicating) Here is the Exhibit 4, of our option.

Mr. Ferrell: It was 'Government's Exhibit No. 1' in this case, Page 71, if the Court please.

Mr. Hanes: That is already in the record. We had it appended there as an Exhibit, also.

The Court: What has Mrs. Williams ever paid for an interest in the land for which final compensation was paid for what was taken from her?

Mr. Hanes: May I direct Your Honor's attention to the letter of Mr. Easley, which expresses it more clearly than I can?

[fol. 373] Mr. Ferrell: We want to go into that, too, later. His Honor's question: How much was she paid under the option? and the option says 'One dollar' and goes on and says: 'Everything I am conveying to you, subject to VEPCO's rights.'

The Court: An 'option' doesn't, ordinarily 'direct,' representative of final transactions; it is an 'option' to do something. What did they do?

Mr. Ferrell: Exercised rights under six terms of the 'option,' which was to condemn it and pay 'One dollar' into the court and make distribution.

The Court: How much did they pay the woman?

Mr. Ferrell: We were trying to find that out this morning. I don't represent Mrs. Williams. I was given a copy of the Order, April 1955, for distribution of 'One dollar.' I asked Mr. Hanes: 'Was this ever entered?' He didn't know because it was 'John Strickler' who, ostensibly, asked for it, and we called the Clerk's office and we can't find that this Order has ever been entered. So, as far as we know, the 'Dollar' is still in the registry of the court and has never been paid Mrs. Williams.

Mr. Hanes: May I interrupt just a moment and say, this Order, prepared by my predecessor, and apparently submitted to the attorneys in this matter for approval. There is a place here for Mr. Easley's signature. So the only thing I can say, apparently it has not been approved and that is why it has not been entered. That is all speculation, but we have no indication that it has been 'entered.'

However, I don't want to raise a collateral issue.

I believe you were asking just what rights the government had acquired and what benefits had accrued to the land owners?

[fol. 374] We don't contend to Your Honor that much outright pecuniary consideration was given for this option, but there were other benefits which, we contend, were valid and good consideration, which we hope to show Your Honor, if Your Honor will permit us to make the offer of proof.

The Court: (Indicating) That document Mrs. Williams signed there, you call 'the option,' specifically says that anything she grants or conveys or has been condemned is subject to such rights as VEPCO has?

Mr. Hanes: Yes, sir. However this matter of 'damages to the residue' is a new issue, that has not been raised be-

fore. We have never before, as far as I know, throughout the history of this case, had this point raised; that is to say, that VEPCO is entitled to damages to the residue of the land owned by Mrs. Williams.

The Court: I don't understand they are claiming that, now; they want to be paid for what they own.

Mr. Hanes: My understanding, including what they own and damages to the residue.

The Court: Is that right, Gentlemen?

Mr. Ferrell: Two steps: the Fourth Circuit sent this case back and said 'Fix the value of the government's easement, which is the tract of land before and after the taking,' and that is what has been done, and that was done under each one of the inquiries.

Now at the hearing before the Comissioners—because, naturally, the damages before and after might include some damages to the residue of the tract, so they ask the Condemnation Commissioners, which fix that value: 'Would you also tell us how much of that amount is damages to the residue in that valuation,' and we are again saying, we don't [fol. 375] want this thing to come back. We have no objection. We don't think it is relevant, but we don't have any objection to your finding that out, and the Commissioners reported 'so many many dollars' under each one of the inquiries.

Now, they say, their position is: we don't have any rights to that figure, which is a part of the damages before and after the taking, because, they say, 'you don't own the residue.'

Well, that isn't following the case through in its proper chronology. When VEPCO obtains its easements—which we are going to pay for today—we hope it is specifically provided in the deed referred to in the option agreement that the damage to the residue—when we obtained our rights we paid for the damages to the residue flowing from our easement, and it is recited there, in so many words, 'damages to the residue' plus we had all these rights in the residue which the government has already conceded, in fact more rights in the residue they conceded than the United States government is taking for its purposes—we had more rights in the residue; we say we paid damages for the residue and when you pay off our easement, you pay us

for our easement in toto, not part of our easement. So we say, damages for the residue you are fixing for the government's easement under the second inquiry, because it presupposes our rights stipulated here goes to Contour 321, damages to the residue we paid for.

So we are entitled to compensation, like the Fourth Circuit said, 'before and after the taking.' As a matter of fact, we could have objected before the Commission and said:

'We won't answer that specific inquiry, that gets down to itemization, adding up different valuations to different interests,' but we said 'No, we will let them make the point.' But our position is, we did have rights in the residue, so we are entitled to compensation, to compensation in that as a share-compensation fixed by the Commission for [fol. 376] the government's easement and damages caused by the government's easement.

Mr. Hanes: Your Honor, the inquiries specifically request that the Commissioners include in their consideration any damage to the residue: that is why we made that particular request, with Mr. Ferrell's consent.

Mr. Ferrell: You had to put in 'damages to the residue,' but you were claiming, at that time, benefits. The government has been inconsistent in that; they said 'it was benefits that inured from the government's take to the residue and, under the law, you offset benefits, in the Federal cases, not only against damages to the residue but against the compensation, theoretically, for the land taken, you can offset it against the total amount.' They were claiming at that time they [sic] were benefits, and to follow the mandate of the Court, we had to put that in.

They didn't put on any evidence as to benefits, before the Commission.

Mr. Hanes: For whatever reasoning your Order has been used, you are arriving at the situation, our position, where the owner of the easement is being allowed to get an element of damages normally only to the fee owner, with whom we have already settled, by allowing VEPCO to be the beneficiary of the damages to the residue.

The Court: Go ahead with whatever you want to. This case is very much over-complicated. VEPCO owns valuable rights, for which it paid and should be compensated, which may not be based on the idea of potential power develop-

ment, but if it is for no other reason than value of the land, itself, availability for power purposes.

Mr. Hanes: Since Mr. Ferrell raised this point—this is [fol. 377] for the record—the only reason we have not objected to the Report of the Commissioners is that we objected at our hearing on the inquiries and instructions that were propounded to the Commissioners, and we have not felt it necessary to repeat our objections.

Furthermore, while our objection is not in the record, I believe that when we met on June 9th to receive the Report of the Commissioners I indicated at that time, orally, —and there was no Reporter present—I indicated at that time we would renew our objections to the inquiries and the instructions, for the record.

Mr. Ferrell: I don't recall that. If you say you did, you did. But I do know you haven't filed any pleading, as required by the Rules, objecting to the Commissioners' Report, as such, and I think there is a Rule on that, as to how long it is you have within which to do that, I have forgotten.

Mr. Hanes: Does Your Honor wish to take up our motion, or Mr. Ferrell's?

The Court: What is your motion?

Mr. Hanes: (Indicating document) This is the motion appended to it. This is a motion to exclude damages to residue.

Now the motion as appended to the Schedule 'A,' which is an offer of proof, written offer. We would like to have your permission to make that offer.

The Court: All right, sir.

Mr. Ferrell: Of course it is understood we have made an objection to the offer of proof and exception to all testimony or anything else along that line, and that we will renew our motion, or won't waive the objection and exception by putting on evidence on our side as to the matter under consideration.

[fol. 378] Mr. Lowden: On that offer of proof——

The Court: (Interrupting) Let me finish reading it, first, Mr. Lowden.

Mr. Hanes: There is one typographical error there in the offer of proof, on Page 3, Paragraph D. That should read 'the option agreement included 300 acres—,' instead of '380 acres.'

The Court: That has been corrected.

Mr. Hanes: All right, sir.

Mr. Lowden: Your Honor, you will recall, we tried this case on January 18th, 1954, nearly five years ago, and at the hearing—and you can find this on Page 40 of the transcript—I started to go into this question of what the consideration was between Mrs. Williams and the government, and I asked Mr. Easley, who represented Mrs. Williams, I asked him if he represented her in the negotiations and he said "I did." I then asked him: "Did Olive Williams, at the time of these negotiations, consider that VEPCO had a right to flood 1540 acres of that tract?" Then Mr. Miller objected and the Court sustained the objection, as you will see in the following Page, and what we were getting at, at that point, was this question——

Mr. Hanes: (Interrupting) Your Honor, right at that point, may I interrupt Mr. Lowden and say, that I don't think it is proper to go into the motives behind the parties who are negotiating, and I believe that is why Mr. Miller objected: it wasn't an objection to showing 'consideration,' but an objection to showing the 'motives.' The subjective elements should not be gone into.

Mr. Lowden: I think, if you will read that, you will see [fol. 379], that his objection went to the entire thing, and I was there, and I recall it.

Now after that, the case went up to the Fourth Circuit. I had actually gotten out of the government's file that morning the very letter they put before you. So Mr. Miller knew what he was objecting to.

Anyway, let's assume, for the moment, Mr. Hanes is right.

Then the case went on to the Fourth Circuit and they affirmed it, and then went to the Supreme Court, and the judgment was vacated and certiorari was granted: it was all sent back, on the same day; no one went up there to argue; came back to the Fourth Circuit and they then sent the case back here with directions.

Then, at that point, the government filed all this offer of proof again, with the motion for rehearing to the United States Court of Appeals for the Fourth Circuit.

So Judge Parker had all of that, all of this stuff, at that time and then he denied that thing before we could get down to the Court telling them we wanted to be heard, and he

sent the case back here, with full knowledge of that, and directed this Court to fix compensation in conformity with his Order. Subsequently, in the Twin Cities case, Judge Parker has said again, and after this came back, the Twin Cities, the same proposition, he held, said "What they owned didn't make any difference" and the Supreme Court denied certiorari in that case.

The point I am trying to make is, to me this is not only irrelevant but has already been passed on by the Fourth Circuit Court, because Judge Parker knew all about it: they filed their brief with this attached to it, and sent it back here, and told t... Court to do something else. But we don't want them to put in an offer of proof, because that means that [fol. 380] if, somehow or other, when they take us on up through the courts again, if they can get these people in Washington to agree with them, and then come back here and try the issue on that offer of proof.

So what the property owner and the power company would like to do is to go ahead and try the evidence on this issue; cross-examine these people, see if what they are talking about is really true; and we would then like to preserve our objection to it. At least, we will, then, have covered the field in the evidence, that anybody can imagine isn't in here, so we can, once and for all, settle this case, whatever view may be taken of it in the future. I think, then, we will have everything in the record.

The Court: All right. I am perfectly willing for you to make the record. I have definite ideas about it.

Mr. Hanes: (Indicating document) I believe Your Honor agreed to let us introduce that?

The Court: Go ahead.

Mr. Hanes: One factor should be called to the Court's attention, and that is: assuming that I am wrong in saying that objection was made, because of the element, of the subjective element, the motives behind all this original negotiation, assuming that I am wrong, still there is a new element injected in the proceedings, and that is the question of 'damage to the residue.'

Now what we intend to show, or hope to show, is that an adequates settlement was made with the owner of the residue and VEPCO should not get any part of 'damage to the residue' since the settlement——

The Court: (Interrupting) Go ahead and put in anything you want to.

[fol. 381] Mr. Hanes: I don't want to take up the Court's time by just repeating what is already in our offer of proof. I believe the Court has already read it and Counsel has a copy of it. However, I would like to call the Court's attention to the Exhibits that are attached to the offer of proof:

The first Exhibit being the letter of April 3rd——

The Court: All I see, your offer of proof consists of, is this: when you took the land, supposed to take it in fee simple, and Counsel for Mrs. Williams took the matter up and spoke about this property being used as a 'Game Preserve,' desired to still continue as far as possible, but if the government took the fee simple to the property, would embarrass that effort very much, and requested, or urged you take only the flowage easement?

Mr. Hanes: Yes, sir.

The Court: And the government consented to do that, and this woman executed a paper there in which she made it plain that the rights of VEPCO were excepted from anything she undertook to convey, everything she did was subject to the rights VEPCO had. Isn't that about all it amounts to?

Mr. Hanes: Absolutely. And I don't want to take up your time by going into a detailed argument about it.

I don't believe there is any question about the authenticity of these letters: believe Counsel for VEPCo has agreed they are authentic.

I might add, if this unique theory as to 'damage to the residue' is granted in this case, then I suspect that it will open the flood-gates all over the country for this allowing of 'damages to the residue,' where the settlement has already been made with the owner, who is entitled to 'damages to the residue.'

[fol. 382] Mr. Ferrell: Does that complete your — ?

The Court: (Interrupting) Are you sticking, solely, on these items allowed, for damages to the residue ruling to pay everything else?

Mr. Hanes: Subject to our objections made initially, at the time we decided upon the inquiries and instructions.

Now I would like to suggest to Your Honor, that the results found on one of the inquiries, we believe that

the results found on Inquiry No. 4—assuming the validity of the previous proceedings and not waiving any objections we have made, we believe that they more accurately depict the damages that should be allowed.

However, in that case, on Inquiry 4, you will please notice that the acreage is listed as 1,840, whereas the acreage affected by VEPCO's easement was 1,540, and further, under that Inquiry, damages in the amount of $9,000.00 to the residue have been allowed.

So, with the modifications, based on what I have just said, that is: there should be an exclusion of 300 acres and $900.00, I mean $9,000.00 damages to the residue, we would urge the Court to adopt that finding.

Mr. Ferrell: If he has finished his 'offer of proof,' we would like to finish that phase of the case, first, and then start talking about the apportionment of the award.

The Court: I understand he has put in what he calls his 'proof.'

Mr. Ferrell: All right. We would like to call Mr. Buford as an adverse witness to the stand.

* * * * * * *

[fol. 383] TESTIMONY OF ROBERT P. BUFORD

Cross-examination.

By Mr. Ferrell:

Q. Please state your name?
A. Robert P. Buford.

Mr. Hanes: We will object to his being considered as an adverse witness, Your Honor.
The Court: Go ahead.

Q. (By Mr. Ferrell, continuing) You are the representative of the United States Government who had the exchange of letters with Mr. James S. Easley, who is on my left, those letters having just been put in evidence?
A. Yes.

Mr. Ferrell: I don't believe they have been marked. What designation do you want to be put on them?

Mr. Hanes: Been marked by me but not by the Reporter.

Since there was no question as to its authenticity, I did not introduce it formally, as a separate part, but I will be glad to do that.

Mr. Ferrell: You are making up a record for appeal, so let's do it right.

Mr. Hanes: I wish to offer in evidence as Government's Exhibit No. 1 through 4, four documents, the authenticity of which has been stipulated to by Counsel, been agreed upon: the first Exhibit being a letter dated April 3rd, 1950, from Mr. James S. Easley to R. P. Buford; the second being a letter dated April 4th, 1950, from R. P. Buford to Mr. James S. Easley; the third being a letter dated June 7th, 1950, to Mr. R. P. Buford from Mr. James [fol. 384] S. Easley; and the fourth Exhibit being an Option Agreement executed between Olive Vaughan Williams, vendor, and the United States of America, on April 30th, 1951, and accepted by the United States of America on May 31st, 1951.

Government's Exhibit 1 to 4, inclusive, just described above, filed.

Q. (By Mr. Ferrell, continuing) Mr. Buford, in April, of 1950, the United States government had not, definitely, determined to condemn the fee simple interest in that portion of the Falkland tract, which it wished to acquire, had it?

A. It had not definitely determined that.

Q. And isn't it true, as stated in the government's opening brief in this case, that it is the policy of the government to condemn only the minimum interest which it needs, to accomplish its purpose and leave to the land owner as much of his property as possible?

Mr. Hanes: I object to the leading nature of these questions, Your Honor.

The Court: That is all—he is just reading from the brief, or something. There is no objection to that.

Mr. Hanes: I would like for him to be more specific. What area is he referring to when he is talking about 'policy?' Does he mean, all over the United States, or in this particular area?

The Court: He is asking if Mr. Buford has an explanation? He may make it. I will overrule the objection.

Q. (By Mr. Ferrell, continuing) Isn't it true, at that time, as stated by the government in its opening brief to the Fourth Circuit in this case, that it was the policy of the government to condemn only the minimal interest which [fol. 385] it needs to accomplish its purpose and leave to the land owner as much of his property as possible?

A. I can only answer that by saying what my understanding of the policy was.

Q. Yes, sir. Was that your understanding?

A. Our original acquisition plan, and the directive under which we began acquisition of land, called for the acquisition of all land within the reservoir area in fee simple, except it did provide, in specific areas where a less interest could be justified, consideration would be given to acquiring such a lease, but it was, definitely, the policy to acquire all land in fee simple.

Q. So you disagree, in part, with that statement I read to you?

A. Yes.

Q. On April 3rd, 1950, it had not been, definitely, determined that you were going to ask for, or condemn a fee simple interest in the Falkland tract?

A. At that time we had not investigated the Falkland tract.

Q. Now following Mr. Easley's first letter to you, which is Exhibit 1, dated April 3, 1950, you took the matter up with the Corps of Engineers, did you not?

A. That is correct.

Q. And investigations were made, subsequent to that time?

A. That is correct.

Q. And subsequent to June 7, 1950, when Mr. Easley wrote you the letter that is introduced as Exhibit 3?

A. That is right.

[fol. 386] Q. And that is the June 7th letter?

A. That is right.

Q. Now do you have the correspondence between the Engineers, Chief of Engineers, relating to this specific matter, on the acquisition of lands from the Vaughan Estate,—Buggs Island Reservoir Project, Virginia and North Carolina?

Mr. Hanes: I would like to object to any further correspondence; not that we have anything we want to hide at all, but simply because we feel it is cumulative and adds nothing to the case.

The Court: The objection is overruled.

Q. (By Mr. Ferrell, continuing) Do you have that correspondence?

A. I have a copy of it.

Q. And in the course of your duties on this project, you received those, is that correct?

A. I saw them.

Mr. Ferrell: Now we would like to introduce in evidence (in evidence) the communication from Vernon A. Frazier, Assistant, Acquisition Division, Real Estate Department of the Army, Office of the Chief of Engineers, dated 12 October 1950, on the "SUBJECT: Acquisition of Lands From the Vaughan Estate—Buggs Island Reservoir Project, Virginia — North Carolina" = "TO: The Division Engineer, North Atlantic Division, Corps of Engineers, New York 7, N. Y."

A. It is to the Division Engineer. May I correct you?

Mr. Ferrell: I am sorry. To the Division Engineer.

[fol. 387] Defendants' Exhibit No. 1, last above described, filed (Filed as Defendants' H)

Q. (By Mr. Ferrell, continuing) And the first endorsement thereto dated 16 October 1950, by the Division Engineer, is that correct? Do you have that?

A. Yes.

Q. The second endorsement, dated 4 December 1950, by the District Engineer; the third, dated 5 December 1950, by the Division Engineer; the fourth endorsement dated 23 January 1951, by the Chief of Engineers—and that is Colonel Hastings, is that right?

A. That is right.

Q. And the fifth, dated 29 January 1951, by the Division Engineer; and the sixth endorsement dated 21st day of March 1951, by the District Engineer; and the seventh endorsement dated 3 April 1951, by the Division Engineer; and the eighth endorsement, dated the 18th of April, 1951, by the Chief Engineer; and the ninth endorsement, dated

the 24th day of April 1951, by the Division Engineer—all relating to that subject, is that correct?

A. Yes, sir.

OFFERS IN EVIDENCE

Mr. Ferrell: We ask that these be received in evidence and marked Defendants' Exhibit H.

We might add, there are two attachments that are referred to in one or more of the endorsements.

May we have these marked together, as Exhibit H?

The Court: Yes, you may.

Defendants' Exhibit H, just referred to and described, filed.

Q. (By Mr. Ferrell, continuing) Now do you have an- [fol. 388] other letter from Colonel Hastings, I believe to Senator A. Willis Robertson, dated February 20, 1951, on this same subject?

A. I have a copy of it.

Mr. Ferrell: We ask this letter, or a copy of the letter, from Colonel Hastings to Senator Robertson be received in evidence and marked Defendant's Exhibit "I."

The letter last above referred, to, marked Defendants' Exhibit "I," filed.

Q. (By Mr. Ferrell, continuing) Now Mr. Buford, there was another tract of land owned by Mrs. Olive Williams that had no flowage rights of VEPCO on it, is that right? and wasn't that across the river?

A. Mrs. Williams owned a tract of land across the river.

Q. And that was the tract known as "BB-2739?"

A. That is correct.

Mr. Hanes: We have enough tracts in this case, as it is, without bringing in a tract not directly involved.

Mr. Ferrell: You went into this thing. We will show where VEPCO's right is not involved, we did something else.

Mr. Hanes: And we will show, in certain cases VEPCO took other action that did not involve any consideration——

The Court: (Interrupting) And I am telling you, frankly, I will not pay much attention to it but if you want to put it in, put in everything you can think of.

Q. (By Mr. Ferrell, continuing) That tract was not included in the option agreement of April 30, 1951, was it?

A. It was not.

[fol. 389] Q. And it was approximately a 50-acre tract, in all, wasn't it?

A. That is my recollection.

Q. And the government condemned a portion of that in fee?

A. That is correct.

Q. And you had no agreement as to compensation with Mrs. Williams on that?

A. Not prior to the condemnation.

Q. But you did pay into Court, and was finally paid out to her, as an award in condemnation, between $1200.00 and $1300.00?

A. That is right.

Q. Now in Mr. Easley's letter to you, of June 7th, 1950, he referred to 380 acres, a tract subsequently acquired by Mrs. Williams. That is not involved, directly, in this case, is it?

A. I don't think so.

Mr. Ferrel: I have no further question, Mr. Hanes, of Mr. Buford. He has been a nice 'adverse witness.'

A. May I add to one of your question there?'

Mr. Ferrell: I will agree to it, Mr. Buford.

The Court: Something you want to 'add?'

A. Yes, sir.

The Court: Go ahead.

A. I believe one of your questions, "Did Mrs. Williams own a tract of land on the river"—she did have an interest in that tract of land, in which VEPCO did claim an interest before the settlement agreement.

[fol. 390] Q. (By Mr. Ferrell, continuing) but wasn't part of the option agreement?

A. No.

Q. But you settled with Mrs. Vaughan and paid the fee value?

A. Yes and VEPCO disclaimed all interest in that tract of land.

Mr. Ferrell: That is all.

. . . . . .

Redirect examination.

By Mr. Hanes:

Q. With respect to this correspondence, which the Attorneys for VEPCO have introduced, I would like to direct your attention to the first paragraph in the letter of October 12, 1950, to the effect that:—

"Reference is made to 3d indorsement from your office dated 8 May 1950 and letter to Senator A. Willis Robertson dated 22 may 1950 . . ."

Do you have that correspondence, or copies thereof?

A. I have 'copies thereof.'

Q. All right.

Mr. Hanes: I would like to introduce that correspondence, since it is all part of the same negotiations.

Mr. Ferrell: We have no objection, except our overall objection to the whole line of testimony, which we don't want to waive.

OFFER IN EVIDENCE

Mr. Hanes: I would like to offer in evidence, as Government's Exhibit No. 5, a letter dated April 3, 1950, from [fol. 391] James S. Easley to Senator A. Willis Robertson, with enclosures:

As Government's Exhibit No. 6, a letter dated April 4, 1950, from Senator A. Willis Robertson to Major General Lewis A. Pick, with exhibits;

Also as Government's Exhibit 7, the letter from Colonel C. T. Derby to the Norfolk District, Corps of Engineers, dated April 7, 1950, and the first endorsement thereto.

Government's Exhibits 5, 6 and 7, last above described, filed.

. . . . . .

STATEMENT BY COUNSEL RE RECORD

Mr. Ferrell: To make this record a little bit better, we would like to move that all Interrogatories, both by the government and VEPCO, and Answers thereto, be made a part of the record in this case; and we would like to further move that all the stipulation of January 18, 1954, and all the Exhibits referred to therein, be made a part of the record. There are several deeds, and we want to be sure they are in the record, referred to in the stipulation.

The Court: I don't know what they are.

What have you to say, Mr. Hanes?

Mr. Hanes: I was talking to Mr. Buford. Would you read the question back?

Mr. Ferrel: It was my motion to make all deeds referred to in the stipulation, printed in the Appendix to government's opening brief—that is, the stipulation, itself, and all deeds as Exhibits, made a part of the record in the case.

Mr. Hanes: We have no objection.

[fol. 392] TESTIMONY OF JAMES S. EASLEY

Direct examination.

By Mr. Lowden:

Q. Please state your name, Mr. Easley?

A. James S. Easley.

Q. Mr. Easley, do you practice law in South Boston, Virginia?

A. I do.

Q. Will you tell us how long you have practiced there?

A. Since June 22, 1907.

Q. Mr. Easley, I am going to hand you a photostatic copy of a deed dated October 14, 1925, between the Falkland Estate, Incorporated, and the Middle Virginia Power Company, and ask you to look at it, please.

Mr. Hanes: Perhaps, if it is agreeable to Counsel, we could agree to the admission of these deeds.

Mr. Ferrell: They are already admitted, by motion, by my motion.

Mr. Hanes: But with the additional Interrogatories and questions of the Court concerning them, asked at the original trial.

Mr. Lowden: At the original trial, the government objected and the objection was sustained.

A. I have examined the deed.

Q. And did you, in October 1925, represent the Falkland Estate in the transactions leading up to this deed?

A. Yes, I was Counsel for Ira Vaughan, who owned the Falkland Estate and this power company; and also Attor- [fol. 393] ney for the Falkland Estate, though that deed wasn't written by me; it was written by Judge Embry, of Fredericksburg, who did the legal work in connection with the formation of these corporations, to which Colonel Vaughan conveyed certain interests—one, the Middle Virginia Power Company, to which was assigned, as I recall, the easements that he had on the Dan River—on the Falkland Estate, that belonged to him: he separated those rights from the property, itself.

Q. So you were familiar, at the time, with what that deed purported to do?

A. Yes.

Mr. Ferrell: I might say, for the purpose of the record, that deed is "Exhibit C" with the stipulation and we will have it tied in.

Q. (By Mr. Lowden, continuing) Now Mr. Easley, I hand you a deed dated the 3rd day of January 1942, between Hannah Ann Vaughan and the Middle Virginia Power Company, and ask you to look at that..

A. Yes, sir.

Q. And I will ask you: Did you prepare that deed?

A. I think I did, to the best of my recollection, I wrote that deed to correct some error in the former deed of conveyance to Middle Virginia Power Company.

Q. In any event, you represented one of the parties to that deed?

A. I represented Hannah M. Vaughan, wife of Colonel Ira Vaughan. Many of these properties were conveyed to her as Trustee; some conveyed to her, outright.

Q. And you were familiar with what the deed purported to do?

[fol. 394] A. I was. I don't know exactly what the correction was. I will have to read it all over, but I am confident I did write that deed. I see the back of it is on my folder, with my name on it, and I am confident as I can be that I wrote that deed.

Q. Did you represent Mrs. Olive Vaughan Williams, in connection with a negotiation of an option agreement, purporting to give the government an option to take an easement over the Falkland Estate?

A. I did.

Q. And did Olive Vaughan Williams consider that the right to flood the property up to Contour 321 would have to be acquired from VEPCO?

Mr. Haines: I object to that. That is a matter within her own mind; Mr. Easley isn't in a position to know what she was thinking.

The Court: When she gave the option, she said it was conditioned on VEPCO's right, didn't she?

A. That was the basic reason for the settlement.

Q. And did you convey Mrs. Williams' position to the government?

A. I did.

Q. And is it in that letter of June 7th, which is in evidence as Exhibit 3?

A. Yes, sir. I think, probably, that was the first letter I wrote, when I opened negotiations which led to the agreement on the part of the government to waive the taking of the fee simple title and to take the easement there. I think that is the opening letter, there. I am not positive.

Q. And that is the letter of June 7th?

A. Yes. There was a prior letter to that; the other was [fol. 395] where I opened the negotiation and then I set out in some detail what my plan was.

The Court: April 3rd was your first letter?

A. That was the first letter, I think.

Q. And was your plan carried forward, in the option agreement, with the United States, which was dated April 30, 1951?

A. It was.

Q. One last question: Does Mrs. Olive Williams claim any of the compensation to be awarded in this proceedings?

A. She does not—only her interpretation of the law and certainly I, as her adviser, thought that the rise up to the 321 foot level—I didn't know just what it was, I guess 318 feet, but she and you understood, as I advised her, those rights were conveyed to VEPCO and it was the feeling, in my opinion, that the difference between the 321 foot, or level which the VEPCO had, to the 330 foot level, was comparatively a small thing because you have got out of the river bottoms and was land upon the bluffs leading up to the river, the least valuable of any other lands on the farm, my view of it, so therefore I didn't think there was a great deal of difference between the rights the power company had and rights the government would take.

Q. Did you understand that the government was going to negotiate with VEPCO for those rights?

A. Oh, yes.

Mr. Lowden: Your witness.

Cross-examination.

By Mr. Hanes:

Q. Mr. Easley, I will ask you to look at your letter of June 7th, 1950, paragraph 4, of that letter, which says: [fol. 396] "This entire Estate has been used exclusively for the past twenty-five years or more as a conservation project by the owners. The conservation covers timber and the development and propagation of wildlife. There is no agricultural activity on the land except for a few patches of open ground used by the employees who operate the project for their sustenance. In the course of the past twenty-five years the owners have spent large sums of money in the development of this project which at the present time is one of the outstanding conservation projects in the State and the game feature was recently discussed in an article published in the 'Virginia Wildlife Magazine.'

"It can be readily seen that if the Government insists upon taking fee simple title to the area within the 330 foot contour it would mean the loss of probably more than 1,000 acres of the land and over an area which at points would cut the property entirely through and thus destroy the control of the owners over the property so that the maintenance of a game-protective area would be impracticable.

"For these reasons it has been and is my hope that the Government may be willing to accept riparian rights and leave the ownership and control of the property to the owners so that they may continue their conservation project.

"If the Government will accept this suggestion and make an exception of this property on account of its present dedication to conservation practices the owners would convey whatever additional riparian rights would be needed for a nominal sum."

A. That is correct. Yes, I wrote that.

Q. Did you write that?

A. Yes.

Q. At Mrs. Vaughan's request?

[fol. 397] A. I advised her; she accepted; and I wrote the letter.

Q. Now the deeds that were referred to, Mr. Easley, do they show any pecuniary considerations?

A. Those deeds—you see, the property all belonged to the same person: Mr. Vaughan owned the Falkland outright; he owned the power company. He was developing and he was looking forward to taking a small power unit and converting it into an interconnected system and wanted to convey the rights on the river to this power company, which was owned by him, entirely—and I don't suppose there is any consideration set up. I don't know. But they belonged to the same person. I think that is where the trouble came, to find out what the valuation was.

Q. How did the Virginia Electric Power Company subsequently acquire the property of the Middle Virginia Power Company?

Mr. Ferrell: That is a very long story, already stipulated. It is terribly involved.

Mr. Hanes: It may be amusing to Counsel——

The Court: (Interrupting) I said I would give you all sorts of leeway, let you put in everything you want to, but how in the world does that affect the question here, Mr. Hanes?

Mr. Hanes: We have felt all along, Your Honor, that the fair market value of the rights of the Virginia Electric should have been the criteria for compensation, their fair market value, and nowhere, at any time, in the proceedings

has there been any evidence as to what Virginia Electric paid for these rights, in the first place.

The Court: That wouldn't be any criteria. Suppose they had been given to them? they still owned them. You [fol. 398] people recognized all the way through they owned them. October 12, 1950, Colonel Powers, or whatever his name is, wrote:

"Title certificates have not as yet been obtained, however, preliminary studies indicate that the title to subject lands is complicated by riparian rights owned by the Virginia Electric Power Company. These rights were created about 1907 for the purpose of constructing a hydroelectric power dam. While no use has ever been made of such rights, it is believed the Power Company will seek compensation for the same. Since there are many ramifications involved, it is also believed that litigation will result, whether Government acquires the fee or a flowage easement from the Vaughan Estate."

And the following March 21, 1951:

"(2) It is proposed to acquire the rights of the Virginia Electric and Power Company by a separate transaction in accordance with the alternate suggestion contained in paragraph 2 of preceding 4th Indorsement for the reason that it is considered desirable to negotiate a binding agreement with the landowner at the earliest possible date in accordance with the terms set out in Inclosure 1. It is anticipated that negotiations with the Virginia Electric and Power Company will be *lenghty* [sic] and that many perplexing questions will be raised for the reason that its rights involve a dam site, flowage and riparian rights, together with the right to construct a dam and such structures as are appropriate for a dam and reservoir operation."

You knew the power company owned it?

Mr. Hanes: Yes, sir. We certainly wouldn't contradict that, but we are simply trying to bring out the fact that [fol. 399] there has never been offered any evidence showing what Virginia Electric Power Company paid for them.

The Court: That doesn't make any difference; that isn't the test of the value.

Mr. Hanes: Not the only test, we agree, but might it not be considered 'one' test, 'one' admissible item?

The Court: That ought to have been put before the Commission.

Mr. Hanes: We were excluded.

The Court: Submitted to the Commission and it report what the value of those rights are.

Mr. Hanes: But we were excluded from submitting evidence of that type by Instruction of Your Honor, and Inquiries submitted.

The Court: I don't remember I restricted the Commission what they should receive.

Mr. Lowden: That was January 18, 1954, five years ago. The Court asked me that question and I made the statement in the record just how the Virginia Power did acquire the rights and in between the time the Commissioners were appointed and the time of the hearing in South Boston, if I am not mistaken, the United States Attorney came to VEPCO and we gave them our records, showing how the rights were acquired and he decided he didn't want to put them in evidence.

Mr. Ferrell: This is stipulated—as Mr. Lowden said, that would be an interesting factor, and explained why we could not prove the consideration at that particular time, and your Honor said it didn't make any difference.

It is all in the record, and we didn't put on the Title At- [fol. 400] torney we had because we had stipulated and agreed upon the thing.

Now if we are going to retry the case, because Mr. Hanes hasn't read the record, the stipulation and colloquy between the Court and Counsel, on January 18, 1954, we will never get through the case.

Mr. Hanes: If Counsel will keep his inferences down, I will appreciate it. The record has been thoroughly studied.

Your Honor please: I don't want to prolong this but the last paragraph of your Instructions say:

"In making your determination of fair market value, you should disregard the fact that Virginia Electric Power Company has perpetual flowage easement over some of the land in this case, and owner of the fee, Mrs. Williams, and the United States made an option contract April 30, 1951, should be disregarded; and you are further instructed you should not attempt to determine the value of the respective

interests of the owners of the fee, or such flowage easements."

We made an abortive effort to introduce an Offer of Proof and were reminded, and probably justifiably so, that wasn't the place to do it because of Your Honor's Instructions.

The Court: Make an Offer of Proof, of what?

Mr. Hanes: Similar to what you have there, showing there was a consideration for the settlement with the fee owner.

The Court: But what you were asking a minute ago: you said you had never been able to find out what VEPCO paid for its rights, and I say that isn't important, if it owned the rights.

[fol. 401] Mr. Hanes: All right, sir.

We have no further questions, your Honor.

Redirect examination.

By Mr. Lowden:

Q. Mr. Easley, you recall the tract over here, the other side of the river, BB-2739?

A. Yes, sir.

Q. Do you recall whether or not Mrs. Williams and VEPCO made an agreement as to the distribution between them of the funds paid?

A. Yes, sir. I collected the money, for her, and paid VEPCO, I think, half of it. I wouldn't be absolutely certain.

Q. And do you recall the tracts at the upper end of the reservoir, in the JJ Section up above South Boston?

A. Yes.

Q. Do you know whether or not VEPCO came to South Boston and made settlement with the people up there, over whose property we had riparian rights?

A. Yes, sir.

Mr. Lowden: That is all.

Recross-examination.

By Mr. Hanes:

Q. Mr. Easley, what agreement was made respecting this tract that has just been referred to, concerning VEPCO's interest in it?

A. I took the matter up, as Attorney for Mrs. Williams, with the power company and, I don't remember all the details, finally agreed we would divide the money from that, [fol. 402] because they had some rights on it. I collected whatever money it was and sent half of it, or a portion of it, I think a half, I am not absolutely positive about the proportion.

Mr. Hanes: All right, sir.

Re-redirect examination.

By Mr. Lowden:

Q. Then VEPCO disclaimed any interest in the condemnation proceedings?

A. Yes.

Q. And that settlement was subsequent to the time condemnation proceedings was—?

A. (Interrupting) Yes.

Q. (Continuing)—was begun?

A. I don't remember the date; it was some time after this option agreement, so forth, with Mrs. Williams; that came later but I don't remember just how much later.

Mr. Louden: That is all.

(Witness excused.)

Colloquy and Argument of Counsel

Mr. Ferrell: We have no further evidence on this point, Your Honor.

Mr. Hanes: We have no further evidence.

The Court: Mr. Hanes, as I understand, the government is taking the position Virginia Electric Company's rights have no value, it has nothing for which it should be compensated? Will you tell me upon what possible theory, this Mrs. Williams, the rights had been acquired from her? [fol. 403] When she came to deal with the government,

she pointed out that the Virginia Electric Company already had flowage rights up to Contour of 321, and when the government proposed to take the fee simple she asked them to take only flowage rights, "if you will take the flowage rights only and abandon your idea of taking the fee simple property, I will let you have flowage rights up to 330, an additional distance, or height, for a nominal sum," because, as Mr. Easley said, that land wasn't of any value anyhow, but in her option she repeated "Virginia Electric had flowage rights up to 321," and as I understand, that covers 1540 acres.

Now upon what possible theory can the government say they cannot be compensated for it? Is the government going to take 1540 acres of land and not pay 'anybody' for it?

Mr. Hanes: You know the history of the case better than I, Your Honor.

The Court: I have lost the history of the case, with all the complications thrown in it by Attorneys in the appellate courts.

Mr. Hanes: As I recall, initially it was shown that Virginia Electric Power Company didn't have an integrated power site. I believe that was admitted by stipulation. It was also eventually decided that these rights existed on a navigable stream, in which the government had a servitude.

When these facts are coupled with Virginia Electric Power Company's inability to show any evidence of value ever paid, or any evidence of market value, the government, at the inception of these proceedings, decided that its value was nominal, only; that the fee owner still had rights in the underlying land and that VEPCO should be compensated only to a nominal extent, because settlement had already been made with the fee owner.

[fol. 404] The Court: But the fee owner, in executing this instrument she did, said that was 'subject to VEPCO's rights' and your own man says 'You have to deal separately with VEPCO because they have valuable rights there,' he says.

Mr. Hanes: I don't want to go outside of the record but, with a corps of engineers, a conversation with the Corps of Engineers, they suggested they thought originally VEPCO would probably join in this option, the option executed by the fee——

The Court: (Interrupting) They suggested, what?

Mr. Hanes: The representatives of the Corps of Engineers suggested, to me, that at the outset they thought that VEPCO would join in the option that was executed between Mrs. Williams and the government, but they ran into some difficulty and felt, in view of that, the proceedings would be delayed and we haven't been able to settle.

The Court: They indicate, in their letters, they hoped VEPCO would join in the conveyance with Mrs. Williams. I don't know what ground they had to 'hope' so.

Mr. Lowden: I was the one they first came to see, and he is giving what somebody told him, but I will tell you what, really, happened.

The Court: I am not in the least bit interested.

Mr. Lowden. They waited until they got this thing signed and then said "Your rights are worth nothing, and we are not going to pay you anything." I said "This is going to be a great big long settlement. We are perfectly willing to make a reasonable settlement with the government, at a low figure, and give a quit claim deed, but not give it to you for nothing. If you want to sit down and talk about a rea- [fol. 405] sonable settlement, we can settle this quickly" but they never offered us anything for the property.

The Court: Proceed, Counsel.

Mr. Ferrell: We have prepared some notes and part of, as you know, a Memorandum of Argument, we would like to go over with the Court, because we think it condenses, as much as we could do in the time we had at our disposal, the issue at this time. We have also prepared formal Order and Judgment in this case, hoping we could get through this thing today.

The Court: You have a good chance of getting 'through it today.'

Mr. Ferrell. Then could we be heard, and go over this Memorandum?

The Court: We had better get our lunch, first. What is the significance of these third and fourth alternative findings here?

Mr. Ferrell: We didn't think them significant at all, but the government was arguing, at that time, another theory of the case, so we said "We will put in your theory, too," this theory that only a small tract is involved and to take it

piecemeal and condemn, is not within the mandate of the Court, and if we are wrong, we don't want to have to go back again and put in the third and fourth; first was in strict compliance with the mandate of the Circuit Court. Second, VEPCO flowage rights, up to 321 and we had stipulated to that.

Mr. Lowden: Three and four—you see, what confuses this thing, this morning they filed a motion to exclude damages to the residue; what they are, in effect, saying: "The [fol. 406] Court should grant three and four, instead of one and two." That is what that motion is. Did it the other way, apparently didn't want to agree to the validity of three and four, which boils down to the argument whether you give one and two, or three and four. Do I make myself clear, Your Honor?

The Court: I don't know, but it seems to me—of course, I can be convinced otherwise—this second thing is the one more responsive to the situation in this case than anything else.

Mr. Ferrell: That is exactly our position, Your Honor, and that is what our argument is addressed to why the Court should take No. 2, rather than any of the others—we think we have arugment for No. 1. We have been giving in as much as we could, to cut off extraneous matters—we are foregoing what the Circuit Court seemed to imply and take No. 2, perfectly justifiable, and we can justify it upon appeal.

The Court: Now for the moment, we will proceed in regard to No. 2, without definitely committing myself. Now let's hear you on the question of 'residue,' which, they say, of that award of $11,020.00 would represent 'damage to the residue.'

Mr. Ferrell: Taking this as it was submitted to the Commissioners, it was government's easement which was being evalued, that is government's intermittent flowage easement up to 321, over a tract of 7400 acres. We have agreed, by stipulation we have agreed to that, as a fact.

So the proper measure of damages is the before and after; that is, what the whole land was worth before the taking and what it is worth after the taking.

(Further argument)

[fol. 407] Mr. Hanes: These deeds, here, referring to the one dated October 14, 1925, the rights that were purportedly conveyed were never exercised; furthermore, there is no indication in here of any monetary consideration other than $10.00 was ever paid.

That is just by way of emphasizing the point we have been making all along: that we have asked for proof of consideration for these alleged rights, but we have never been able to get it. We have even gone to the extent of trying to get some evidence from the State Corporation Commission, showing that these rights were adjusted, so on, and tax rates, but with no results whatsoever.

I have already, I think, clarified our position as well as I can throughout the course of the hearing this morning and I don't want to prolong it except by way of urging that the fourth inquiry is the more proper one to adopt with the exclusion of the 300 acres that are included there.

In other words, under that inquiry, 1,840 acres is included, which should be 1,540, and that the damages to the residue should be excluded because of settlement with the fee owner and because of failure of the Virginia Electric Power Company to show that it has any right to any damages to the residue.

Mr. Ferrell: One thing I forgot to say: it is in the stipulation, and it appears in our Memorandum of Argument, at the top of Page 11, where the government has stipulated that we have rights above 321 in this tract.

It says, in the Stipulation, Paragraphs 8 and 9:

(Reads paragraphs from Stipulation filed herein)

(Further argument)

[fol. 408] The Court: I don't see any reason for taking this matter under longer consideration. It seems so plain to me, you had valuation made in accordance with the manner which the Court of Appeals said should be done, and I think this Report, under what is called 'the second alternative,' is probably a more accurate representation of the situation, and if you have an Order, or will prepare one, carrying out the Report of the Commissioners to that effect, I will enter it.

Mr. Ferrell: We have that right on your desk, an Order to that effect, and there is only one difference between that

Order and what has happened here this morning and that is the Offer of Proof was excluded, and we objected to it, but I think the rest of it is keeping with what has been done.

Mr. Hanes: Do I understand, you are including award for damage to the residue?

Mr. Ferrell: Yes, including the amount they found there.

The Court: Gentlemen: I suggest—it is time for lunch, I haven't time to read this over—you come back after lunch and I will read this over.

Whereupon at 1:00 o'clock p. m., an adjournment was taken until 2:00 o'clock p. m.

[fol. 409] In United States District Court

A Portion of Plaintiff's Exhibit No. 7 introduced at Hearing on November 24, 1958

Department of the Army, Office of the Chief of Engineers, Washington

7 April 1950

601.1 Buggs Island Dam and Reservoir Project, Va. and N.C. (Misc.) ENGLP

Honorable A. Willis Robertson, United States Senate

Dear Senator Robertson:

Reference is made to your communication dated 4 April 1950 with which you inclosed a letter from Mr. James S Easley of South Boston, Virginia, and a copy of letter from Mr. Easley to Mr. R. P. Buford of Boydton, Virginia, relative to the acquisiton, for the Buggs Island Dam and Reservoir Project, of land owned by the Vaughan Estate in Halifax County Virginia.

In order that full information in connection with this matter may be obtained, General Pick has requested me to transmit copies of your communication and its inclosures to Colonel E. E. Gesler, the Acting Division Engineer, Corps of Engineers, at New York, New York, for further

investigation and report. Upon receipt of his report, further communication will be had with you.

For the Chief of Engineers:

[fol. 410] Sincerely yours, W. H. Hastings, Colonel, Corps of Engineers, Assistant Chief of Engineers for Real Estate.

1 Incl, Ltr 3 Apr 50 fm, Mr. Easley w/1 incl

Borman—72289

In United States District Court

Defendant's Exhibits Introduced at Hearing on November 24, 1958

Exhibit H

Letter of October 12, 1950, to Division Engineer With Endorements Thereon

Department of the Army, Office of the Chief of Engineers, Washington

601.1—ENGLP, Buggs Island Res. Project, Virginia-N.C.—Vaughan State

12 October 1950

Subject: Acquisition of Lands From the Vaughan Estate Buggs Island Reservoir Project, Virginia—North Carolina

To: The Division Engineer, North Atlantic Division, Corps of Engineers, New York 7, N. Y.

1. Reference is made to 3d indorsement from your office dated 8 may 1950 and letter to Senator A. Willis Robertson [fol. 411] dated 22 May 1950, same file and subject as above. In this connection, attention is invited to the pending studies and field work relating to the acquisition of the Vaughan Estate lands to be acquired for use in connection with the Buggs Island Reservoir Project.

2. Information is requested as to the status of the studies and field work in connection with the land and interest to

be acquired in the vicinity of the Vaughan Estate lands. This information is desired in order that a final reply may be made to Senator Robertson regarding the acquisition of the Vaughan Estate land. In the event that the studies and field work have not been completed, it is requested, that this office be advised as to the approximate date the work will be completed.

3. Information is also requested, as to the approximate date Segment Maps will be furnished this office in accordance with the instructions contained in paragraph 2 of 6th indorsement from this office dated 18 August 1950.

By Order of the Chief of Engineers:

(s) Vernon A. Frazier, Assistant, Acquisition Division, Real Estate.

NADRF (12 Oct 50) 1st Ind.

Subject: Acquisition of Lands from the Vaughan Estate—Buggs Island Reservoir Project, Virginia-North Carolina.

Office, Division Engineer, North Atlantic Division, Corps of Engineers, New York 7, New York, 16 October 1950.

[fol. 412] To: The District Engineer, Norfolk District, Corps of Engineers, Norfolk 1, Virginia

1. For information as requested in basic communication.

2. Copy of 3rd Indorsement referred to in paragraph 1 of basic letter was forwarded your office, attention NAORE, under date of 8 May 1950, together with copy of "Revised Draft."

By Order of the Division Engineer:

(S.) William R. Smith, Jr., Lt. Colonel, Corps of Engineers, Assistant Division Engineer (Works)

NAOVR 601.1-R R-B I) 2d Ind (12 Oct 50)

Subject: Acquisition of Lands from the Vaughan Estate —Buggs Island Reservoir Project, Virginia-North Carolina

Norfolk District, Corps of Engineers, U.S. Army, Norfolk 1, Virginia, 4 December 1950

To: Division Engineer, North Atlantic Division, Corps of Engineers, New York, New York

1. Information requested in basic communication is furnished as follows:

(a) Report relative to studies referred to in paragraph 1 of basic letter was transmitted to Office, Chief of Engineers by 4th Indorsement dated 31 May 1950 on basic letter dated 22 November 1949, subject, "Tentative Taking Line— [fol. 413] Buggs Island Reservoir at and above Clarksville, Virginia." Said report was approved by 6th Indorsement from Office, Chief of Engineers, same subject matter, dated 18 August 1950.

(b) Segment maps referred to in paragraph 3 of basic letter are being furnished as completed. To date 5 segment maps (R, S, T, V and AA) have been submitted for areas above Clarksville, Virginia. The remainder will likewise be submitted as completed. It is estimated that all segment maps for Buggs Island Reservoir will be completed by 1 July 1951.

(c) Preliminary studies of lands of the Vaughan Estate have now been completed and acquisition is scheduled for the early part of 1951.

2. In compliance with paragraph 1 (b) of referenced 6th Indorsement, consideration has been given to acquisition of a flowage easement over the lands of the Vaughan Estate and the following is submitted:

(a) This tract is located on the north side of the Dan River, just upstream of the confluence of the Dan and Staunton Rivers, as shown on attached map. (Inclosure 1).

(b) Tract comprises 7,200 acres; Government must acquire to the 330' contour elevation or approximately 1,810 acres; of this, 890 acres will be flooded permanently by the power pool, and 920 acres will be flooded intermittently.

(c) Property is presently being used as a private hunting and wildlife preserve. It is reputed to be one of the finest in Virginia, replete with hunting lodges and all accessories.

(d) Preliminary appraisal study indicates a fee value for the 1,810 acres of $161,200. This is made up principally of timber which is valued at $125,000, the remainder is land at [fol. 414] $20.00 per acre. This does not include any valuation as a hunting preserve. In a final appraisal there would be some additional value included.

(e) The above acreage and valuation is based upon a contour elevation acquisition. Since severance is involved, it would be necessary to make a field survey to establish a tangent boundary line. It is estimated that such a survey would cost approximately $6,000 and take 5 weeks to complete; this difficulty is by reason of the density of forest land. In the event a fee estate was acquired to a tangent line, the above valuation would be increased to $180,000.

(f) Title certificates have not as yet been obtained, however, preliminary studies indicate that the title to subject lands is complicated by riparian rights owned by the Virginia Electric Power Company. These rights were created about 1907 for the purpose of constructing a hydro-electric power dam. While no use has ever been made of such rights, it is believed the Power Company will seek compensation for the same. Since there are many ramifications involved, it is also believed that litigation will result, whether Government acquires the fee or a flowage easement from the Vaughan Estate.

(g) The owner of the subject lands has offered to convey a comprehensive flowage easement to the Government for $1.00 subject only to outstanding interest of the Power Company. See copy of letter offer attached (Inclosure 2). In view of the very substantial savings involved, it is considered to the best interest of the Government to accept this offer.

(h) By reason of location of subject lands in the upper reaches of reservoir, a comprehensive flowage easement will adequately serve the needs of the Government, and the same [fol. 415] will not interfere with the construction, operation or maintenance of the project.

(i) Subject tract is located just above the Staunton River

Park, where flowage easements have been authorized by 6th Indorsement hereinabove mentioned.

3. Accordingly, for reasons above mentioned, it is recommended that this office be authorized to acquire flowage easements using the 330' contour as the take line over lands of the Vaughan Estate.

(S.) W. F. Powers, Colonel, Corps of Engineers, District Engineer.

2 Incls, 1. Map (in trip), 2. Ltr. dtd 7 June 50 (in trip).
NADRE (4 Dec 50) 3rd Ind.

Subject: Acquisition of Lands from the Vaughan Estate —Buggs Island Reservoir Project, Virginia-North Carolina

Office, Division Engineer, North Atlantic Division, Corps of Engineers, New York 7, New York, 5 December 1950.

To: The Chief of Engineers, Department of the Army
Attention: ENGLP

This office concurs in the recommendation contained in preceding 2nd Indorsement.

[fol. 416] For the Division Engineer:

(S.) Clarence E. Boesch, for William R. Smith, Jr., Lt Col, Corps of Engineers, Assistant Division Engineer (Works)

2 Incls, n c (except 1 cy ea, w/d)

601.1 Buggs Island Dam & Res. Proj.
(B L, 12 October 1950)

Va.-N.C.—The Vaughan Estate—ENGLP, 4th Ind.

Office of the Chief of Engineers, Washington 25, D. C., 23 January 1951

To: The Division Engineer, North Atlantic Division, Corps of Engineers, U. S. Army, New York, N.Y.

1. Consideration has been given to the recommendations contained in preceding 2d and 3rd Indorsements and authority is granted to negotiate for the acquisition of a comprehensive perpetual flowage easement over the lands of the Vaughan Estate for a nominal consideration, the taking line

to be based on elevation 330. The easement estate approved for acquisition must be in accordance with the criteria set forth in paragraph 5201.06 e, (3), Orders and Regulations, and also contain limitations against any buildings remaining in the area and the construction of dwellings or use of the area for residential purposes, together with the unrestricted right of ingress and egress to the area.

2. Since the perpetual right to flow, permanently and/or [fol. 417] intermittently, must be acquired over the entire area of approximately 1,810 acres, such right must also be obtained from the Virginia Electric Power Company by joining in the conveyance with the Vaughan Estate or by separate transaction.

3. It is requested, that the drafts of option and easement deed be submitted to this office for approval, prior to any obligation, accompanied by the views and comments of the Division Engineer. It is also requested, that information be furnished relative to the removal and disposition of the timber, if any, that is to be removed from the permanent pool area of the tract of land.

By Order of the Chief of Engineers:

(S.) W. H. Hastings, Colonel, Corps of Engineers,
Assistant Chief of Engineers, for Real Estate.

2 Incls: w/d

NADRF (12 Oct 50) 5th Ind

Subject: Acquisition of Lands from the Vaughan Estate —Bugg's Island Reservoir Project, Virginia-North Carolina

Office, Division Engineer, North Atlantic Division, Corps of Engineers, New York 7, New York, 29 January 1951

To: The District Engineer, Norfolk District, Corps of Engineers, Norfolk 1, Virginia

[fol. 418] 1. To note the authority furnished by the Office, Chief of Engineers in preceding 4th Indorsement to negotiate for the acquisition of comprehensive perpetual flowage easement over lands of the Vaughan Estate for a nominal consideration, subject to the approval of Office, Chief of Engineers.

2. It is the opinion of this office that the easement should contain limitations against the construction of any type of

structure within the area of the easement, without the written consent of the officer or person in charge of the maintenance and operation of the project.

3. The option and easement deed will be submitted through this office for approval of the Chief of Engineers prior to any obligation, together with information as to the disposition of timber.

4. In the event that the Virginia Electric Power Company will not join in conveyance with the Vaughan Estate, information will be furnished as to contemplated method of acquiring their interest and the approximate value of such interest, if any.

By Order of the Division Engineer:

(S.) William R. Smith, Jr., Colonel, C.E., Assistant Division Engineer, (Works)

NAOVR 601.1 (R/R-B/I) 6th Ind (12 Oct 50)
Subject: Acquisition of Lands from the Vaughan Estate—Buggs Island Reservoir Project, Virginia-North Carolina

[fol. 419] Norfolk District, Corps of Engineers, U. S. Army, Norfolk 1, Virginia, 21 March 1951

To: Division Engineer, North Atlantic Division, Corps of Engineers, New York 7, New York

1. In compliance with request contained in preceding 4th Indorsement, an option covering a perpetual flowage easement has been discussed with the owner of subject tract, and there is inclosed proposed option (Incl 1) which is satisfactory to the owner for review and approval.

2. The option is similar to option NAD-N Form No. 406, 17 Oct 50, except where it was deemed necessary to revise the same to fit the needs of this case. To indicate the revisions, there is inclosed one copy of the proposed option with additions thereto underscored in red (Incl 2) and one copy of option NAD-N Form No. 406, 17 Oct 50, showing the provisions that have been deleted underscored in blue (Incl 3).

3. The following comments are submitted with respect to the revisions incorporated in proposed option:

a. As to page 1:

(1) A provision providing for unrestricted ingress and egress to the area has been inserted in compliance with request contained in paragraph 1 of preceding 4th Indorsement.

(2) The words "or caused to be removed" have been inserted in the thirteenth line to permit the clearing contractor, as well as the Government, to remove artificial or natural structures.

(3) A specific provision has been added so that the Government will not be liable for damages for any structure that may be removed under the clearing program.

[fol. 420] b. As of page 4:

(1) Paragraph 1 of preceding 4th Indorsement requests the insertion of a limitation against any building remaining on the property as well as the construction of dwellings or the use of the area for residential purposes. It is submitted that these broad restrictions in the form of absolute limitations appear to be more stringent than is necessary upon considering the contemplated use of the land by the Government. The property is presently used and will continue to be used by the owner for selective timber cutting and reforestation above elevation 302' and as a game and wild life preserve; therefore, the owner may desire to erect temporary structures on the area which will be subect to flooding at rare intervals in connection with these activities. It is considered that the Government's proposed use of the property will not be interfered with and that its rights will be adequately protected under the third paragraph on page 4 of inclosed option (Incl 1). This provision requires the written consent of the officer in charge of the project prior to the construction of any building or structure over any part of the area on which the flowage easement is being acquired. It is to be noted that no buildings are presented [sic] constructed on the land described in the inclosed option.

(2) It is proposed to acquire the rights of the Virginia Electric and Power Company by a separate transaction in accordance with the alternate suggestion contained in paragraph 2 of preceding 4th Indorsement for the reason that

it is considered desirable to negotiate a binding agreement with the landowner at the earliest possible date in accordance with the terms set out in Inclosure 1. It is anticipated that negotiations with the Virginia Electric and Power Company will be lenghty [sic] and that many perplexing questions will be raised for the reason that its rights involve [fol. 421] a dam site, flowage and riparian rights, together with the right to construct a dam and such structures as are appropriate for a dam and reservoir operation. The proposed option (Incl 1) is made subject to these rights by referring to the recorded grants to the Virginia Electric and Power Company as set forth on page 4 of Inclosure 1.

c. As to page 5:

(1) Paragraph 8 of Inclosure 1 provides that loss or damage by fire or acts of God will continue in the vendor for the reason that there are no structures now on the land, nor is the Government acquiring ownership of the property. In this respect, a substantial part of paragraph 5 of Inclosure 3 is deleted.

(2) The words "and that any and all awards of just compensation that may be made in the proceeding to any defendant shall be payable and deductible from the said amount" have been deleted from paragraph 6 of Inclosure 3 for the reason that the total consideration set out in the proposed option (Incl 1) is One Dollar ($1.00), and therefore the language which is deleted is not appropriate in this instance.

4. The vendor has sold all timber below elevation 302' and the same is now being removed. This operation will be completed well in advance of the reservoir timber clearing program.

5. In accordance with request contained in paragraph 3 of preceding 4th Indorsement, there is inclosed proposed form of easement deed covering the landowner's interest in subject tract (Incl 4) for review and approval.

6. In view of the favorable terms of the proposed option (Incl 1) it is believed to be to the best interest of the Government to acquire the flowage easement from the land- [fol. 422] owner at this time and prior to consummating the acquisition of the interests of the Virginia Electric and Power Company.

7. Accordingly, it is recommended that the proposed option (Incl 1) and deed (Incl 4) be approved and this office authorized to consummate the acquisition of the flowage easement from the landowner prior to concluding the negotiations with respect to the acquisition of the rights of the Virginia Electric and Power Company.

(S.) W. F. Powers, Colonel, Corps of Engineers, District Engineer.

4 Incls. 1. Prop opt (in dup). 2. Prop opt—underscored. 3. Option NAD-N Form No. 406. 4. Prop easmt deed (in dup).

NADRF (12 Oct 50) 7th Ind

Subject: Acquisition of Lands from the Vaughan Estate —Buggs Island Reservoir Project, Virginia-North Carolina

Office, Division Engineer, North Atlantic Division, Corps of Engineers, New York 7, New York, 3 April 1951

To: The Chief of Engineers, Department of the Army
Attention: ENGLP

1. As requested in preceding 4th Indorsement, there are inclosed for review and approval, or comment, copies of proposed option and easement deed to be obtained from owner of the Vaughan Estate, Buggs Island Project.

[fol. 423] 2. It appears desirable to obtain the easement subject to the rights of the Virginia Electric Power Company, and treat their rights by separate negotiation.

3. The removal of timber is now in process, it having been sold by the owner, below the 302 contour which is the established clearing contour of the project.

4. In connection with the limitations as suggested in your 4th Indorsement, regarding buildings remaining, new dwelling construction and use for residential purposes of the area involved, attention is invited to paragraph 3b(1) of the 6th Indorsement which explains the reason for the modification of this limitation in the proposed option and easement. Control of any type of construction would furnish required protection to the Government operation.

5. With the inclusion of the two suggested changes, as indicated in pencil on the easement forms, approval is recommended.

For the Division Engineer.

(S.) J. A. Thornton, Chief, Real Estate Division.

4 Incls—n c. (exc 1 cy Incls 1 and 4 w/d)

601.1 Buggs Island Res. Proj., Va.-N. C.—ENGLP, B/L 12 Oct 50

Vaughan Estate—Tr. FF-3100-E. 8th Ind.

Office of the Chief of Engineers, Washington, D. C., 18 April 1951.

[fol. 424] To: The Division Engineer, North Atlantic Division, Corps of Engineers, New York 7, N. Y.

The proposed option and easement deed submitted with basic letter have been reviewed and are approved as to form. Accordingly, authority is granted to accept an option and proceed with the acquisition of Tract No. FF-3100-E, Buggs Island Reservoir Project, Virginia-North Carolina.

By Order of the Chief of Engineers:

(S) Fred H. Johnston, Assistant, Acquisition Division, Real Estate.

4 Incls; n/c

NADRF (12 Oct 50) 9th Ind

Subject: Acquisition of Lands from the Vaughan Estate—Buggs Island Reservoir Project, Virginia-North Carolina.

Office, Division Engineer, North Atlantic Division, Corps of Engineers, New York 7, New York, 24 April 1951.

To: The District Engineer, Norfolk District, Corps of Engineers, Norfolk 1, Virginia.

Authority is furnished to accept option in subject case and proceed with acquisition.

By Order of the Division Engineer:

(S) J. A. Thornton, Chief, Real Estate Division.

4 Incls, n/c.

[fol. 425] Draft

Honorable A. Willis Robertson, United States Senate,
Washington 25, D. C.

Dear Senator Robertson:

Reference is made to your inquiry of 4 April 1950, concerning the possibility of the Government acquiring riparian rights over lands of the Vaughan Estate for the Buggs Island Reservoir, Va.-N. C.

Colonel E. E. Gesler, Acting Division Engineer, New York, reports that field studies are presently being made in the upper reaches of the reservoir where the Vaughan Estate is located, and present indications are that a comprehensive flowage easement to the Government will be satisfactory, instead of fee simple acquisition. This procedure will accomplish the purpose Mr. James S. Easley suggested in his letter to you dated 3 April 1950 on the matter as riparian rights are interpreted by us to mean flowage easements.

Very sincerely yours,

In United States District Court

Exhibit F

Letter of February 20, 1951, from Colonel W. H. Hastings, Corps of Engineers, to Senator A. Willis Robertson

Department of the Army, Office of the
Chief of Engineers, Washington

20 February 1951.

601.1 Buggs Island Res. Proj.
Virginia and North Carolina– ENGLP

[fol. 426] Honorable A. Willis Robertson,
United States Senate.

Dear Senator Robertson:

Further reference is made to your communication dated 4 April 1950, relative to the acquisition, for the Buggs Island Dam and Reservoir Project, of land owned by the Vaughan Estate in Halifax County, Virginia.

Colonel Frederick F. Frech, the Division Engineer, Corps of Engineers at New York City, has informed me that field studies necessary to determine the extent of the Governmennt's taking and the estate to be acquired in the lands involved, including the Vaughan Estate lands, have been completed.

It has been determined that all lands lying below elevation 330 foot contour will be required for the section of the project in which the Vaughan Estate lands are located. The Vaughan Estate owns approximately 1,810 acres below this contour.

Colonel Frech also reports that representatives of the Estate are agreeable to conveying, in lieu of fee title, a comprehensive flowage easement to the Government for a nominal consideration, subject to rights now held by the Virginia Electric Power Company. The rights of the Virginia Electric Power Company will be the subject of separate negotiations. This proposal has been approved in substance by this office and Colonel Frech authorized to negotiate with the Vaughan Estate on the basis of acquiring a comprehensive flowage easement with certain limitations against buildings remaining in the area. It is anticipated that these negotiations will be completed in the near future. [fol. 427] I trust that the foregoing information is satisfactory for your purposes.

Sincerely yours, W. H. Hastings, Colonel, Corps of Engineers, Assistant Chief of Engineers for Real Estate

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IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS ON APPEAL BY UNITED STATES

Filed April 9, 1959.

The United States of America, appellant in the above-entitled case, makes the following statement of points on which it intends to rely upon appeal:

1. The district court erred in holding that the Virginia Electric and Power Company is entitled to receive compensation for values inhering only in the fee owner.

2. The district court erred in denying the Government's motion to exclude damages to the residue and in awarding compensation to the Virginia Electric and Power Company, part of which compensation expressly represented damages to the residue of the Falkland Estate owned by another.

3. The district court erred in awarding to the Virginia Electric and Power Company a sum even greater than the earlier award which had been based upon the full fee value of the land covered by the Virginia Electric and Power Company's claimed flowage easement.

[fol. 428] 4. The district court erred in failing to find that in view of the fact that the Dan River is an interstate navigable stream, any water power and other riparian rights which the Virginia Electric and Power Company may have are not compensable in a taking by the United States under the commerce clause of the Federal Constitution.

5. The district court erred in failing to hold that such rights as here involved have value only for water power purposes which value must be excluded in this case.

6. The district court erred in failing to hold that since the Virginia Electric and Power Company had no rights except those rights depending upon the flowage and fall of an interstate navigable stream, the Virginia Electric and Power Company had no compensable rights against the United States.

7. The district court erred in failing to hold that the Virginia Electric and Power Company had not acquired sufficient rights to show a reasonable probability of ever developing any valuable rights on the property involved.

8. The district court erred in overruling the Government's objections to the inquiries and instructions that were propounded to the Commissioners.

9. The district court erred in the instructions which it gave to the Commissioners, as for example, in instructing them:

> In making your determination of fair market value, you should disregard the fact that Virginia Electric and Power Company has a perpetual flowage easement over some of the land involved in this case and that the owner of the fee, Olive Vaughan Williams, and the United States made an option contract dated April 30, 1951, and you are further instructed that you should not

[fol. 429] attempt to determine the value of the respective interests of the owner of the fee or such flowage easement.

10. The district court erred in receiving evidence directed to the valuation of something other than the interest of the Virginia Electric and Power Company.

11. The district court erred in overruling the Government's motion for trial by jury and in appointing commissioners to determine the award to be made to the Virginia Electric and Power Company for its interests in the single tract here involved (Tract FF-3100E).

12. The district court erred in entering judgment for $65,520.00.

United States of America, By (S) Perry W. Morton, Assistant Attorney General. (S) Roger P. Marquis, (S) Harold S. Harrison, Attorneys, Department of Justice, Washington 25, D. C.

[fols. 430-432] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 433] IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7882

UNITED STATES OF AMERICA, Appellant,

versus

2979.72 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF HALIFAX, VIRGINIA, OLIVE VAUGHAN WILLIAMS, ET AL., AND UNKNOWN OWNERS, (Tract FF-3100E), Appellees

Appeal from the United States District Court for the Western District of Virginia, at Roanoke

DOCKET ENTRIES

April 18, 1959, record on appeal filed and appeal docketed.
April 18, 1959, original exhibits certified up.
April 21, 1959, appearance of Ralph H. Ferrell, Jr., and Francis V. Lowden, Jr., entered for the appellees.

April 23, 1959, appearance of Perry W. Morton, Assistant Attorney General, Roger P. Marquis and Harold S. Harrison, Attorneys, Department of Justice, John Strickler, United States Attorney, and Leigh B. Hanes, Jr., Assistant United States Attorney, entered for the appellant.

April 25, 1959, Instructions to the Commissioners received from the Clerk of the District Court and associated with the record on appeal.

April 27, 1959, motion of appellant for a continuance from the June to the October term, 1959, of the court, filed. Chief Judge Sobeloff by mail.

Memo. of Clerk: This motion not copied in the proceedings.

April 27, 1959, obections to appellant's motion for an [fol. 434] extension of time for filing brief and appendix filed.

Memo. of Clerk: These objections not copied in the proceedings

April 27, 1959, motion and objections transmitted to Chief Judge Sobeloff by mail.

ORDER EXTENDING TIME FOR FILING BRIEFS AND APPENDICES —Filed April 30, 1959

For reasons appearing to the undersigned,

It is ordered that the time within which the appellant in the above entitled case shall file its brief and appendix be, and it is hereby, extended to and including May 22, 1959, and that the time within which the appellees shall file their brief and appendix be, and it is hereby, extended to and including June 11, 1959.

April 29, 1959.

Simon E. Sobeloff, Chief Judge, Fourth Circuit.

May 26, 1959, brief for appellant filed.

May 26, 1959, appendix to brief for appellant filed.

June 11, 1959, brief for Virginia Electric and Power Company, appellee, filed.

June 11, 1959, appendix to brief for Virginia Electric and Power Company, appellee, filed.

June 22, 1959, reply brief for appellant filed.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION

June 24, 1959, (June term, 1959) cause came on to be heard before Soper and Haynsworth, Circuit Judges, and Thomsen, District Judge, and was argued by counsel and submitted.

[fol. 435] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7882

UNITED STATES OF AMERICA, Appellant,

versus

2979.72 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF HALIFAX, VIRGINIA, OLIVE VAUGHAN WILLIAMS, ET AL., AND UNKNOWN OWNERS (Tract FF-3100E), Appellees

Appeal from the United States District Court for the Western District of Virginia, at Roanoke.

John Paul, District Judge.

(Argued June 24, 1959.)

Before Soper and Haynsworth, Circuit Judges, and Thomsen, District Judge.

Harold S. Harrison, Attorney, Department of Justice, (Perry W. Morton, Assistant Attorney General; John Strickler, United States Attorney; Leigh B. Hanes, Assistant United States Attorney, and S. Billingsley Hill, Attorney, Department of Justice, on brief) for Appellant, and Ralph H. Ferrell, Jr., (George D. Gibson, Francis V. Lowden, Jr., and Hunton, Williams, Gay, [fol. 436] Moore and Powell on brief) for Appellee Virginia Electric and Power Company.

OPINION—October 5, 1959

Soper, Circuit Judge:

The principal question in this case is whether an electric power company, which purchased from a riparian owner

the right to flood the land, is entitled to any compensation when the United States takes over the right from the power company by condemnation. The owner of the fee in the land, having conveyed the flowage rights to the power company and thereby destroyed the value of the fee, agreed to convey the fee to the United States for $1.00, subject to the power company's rights, and the Government contends that the power company should be paid no more because its right to flood the land has no value since it has no right to use the waters of the stream. If the Government's position is sustained, it will pay nothing for the right to flood the land and use it in connection with its flood control project.

The case first came before us in *United States* v. *2979.22 Acres of Land*, 218 F.2d 524. Condemnation proceedings by the United States were taken in connection with the John K. Kerr Dam and Reservoir, a flood control project on the Roanoke River in Virginia and North Carolina. In issue was the value of 1540 acres of land which the Virginia Electric and Power Company had an easement to flood permanently under a conveyance from Mrs. Olive Vaughan Williams, the owner of the fee. Mrs. Williams had agreed to convey to the Government for $1.00 any interest she may have retained in the land; and the value of the Power Company's interest was the question for decision in the condemnation proceedings to which both [fol. 437] Mrs. Williams and the Power Company were made parties. The District Court found that the Power Company was entitled to recover $61,600 for the fee simple value of the land at $40.00 per acre and the Government appealed on the grounds (1) that in fixing the value of the land consideration had been improperly given to its availability for the development of a water power project in a navigable river, and (2) that in any event the Government was not liable for the fee simple value of the land but only for the difference between its value before and after the grant of the easement acquired by the United States.

We rejected the first ground for the reasons set forth in our opinion in *United States* v. *Twin City Power Co.*, 215 F.2d 592, where we held that the availability of land as a potential power site on a navigable stream constituted an element of value for which just compensation must be made. On the second ground we also upheld the conclusion of the

trial court. Since the evidence showed that the right to flood the land permanently left no use of any value to the owner of the fee and that land worth $40.00 an acre before the servitude of the easement was imposed was worth nothing thereafter, we found that the difference between the value of the land before and after the grant of the easement was the same as the fee simple value of the land.

Subsequently our decision in the *Twin City* case was reversed by the Supreme Court in *United States* v. *Twin City Power Co.*, 350 U.S. 222, and it was held that, in condemnation of riparian land by the United States in order to improve the navigation of the stream, just compensation does not include the value of the water power in the flow of the stream; and, since we had not followed this rule, certiorari was granted in *United States* v. *2979.22* [fol. 438] *Acres of Land*, supra, the judgment therein was vacated and the case was remanded to us for further consideration in the light of the Supreme Court's decision.

Accordingly, we reconsidered the case in *United States* v. *2979.22 Acres of Land*, 235 F.2d 327. In our opinion we pointed out that although the availability of the land as a site for water power development could not be considered in assessing damages against the United States, nothing in the opinion of the Supreme Court held that compensation should not be paid for other elements of value, such as value for agricultural or grazing purposes. In answer to the contention of the Government that the Power Company was entitled to receive nothing for the reason that its flowage rights were of value only for the purposes of water power development, we held that the conveyance of the flowage rights by the owner of the fee to the Power Company vested in the latter an interest in the land that was being taken by the Government in condemnation therefor. The judgment of the District Court was accordingly vacated and the case remanded with direction to award compensation to the Power Company for the difference between the value of the land with and without the servitude of the easement, excluding from the valuation in both instances any element of value arising from the availability of the land for water power purposes. Subsequently, a petition for rehearing filed by the United States was denied, 237 F.2d 165.

On remand the District Court appointed commissioners to determine the amount of compensation to be paid by the United States. The area of 1540 acres of land over which the Power Company had a flowage easement was part of a larger tract of 7400 acres known as the Falkland tract. [fol. 439] The easement of the Power Company comprised the right of permanent flowage over 1540 acres of the land up to a contour level of 321-feet, while the easement condemned by the Government involved the right of permanent and intermittent flowage over 1840 acres of the land up to a level of 330-feet; and it was essential for the Government to acquire what the Power Company owned. The judge directed the commissioners to answer an inquiry, amongst others, as to what was the difference between the fair market value of the total Falkland tract with and without the servitude of the Government's easement, assuming that the easement was over the land up to contour 321 only, involving 1540 acres, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream. The commissioners were further instructed that in making their determination of fair market value they should disregard the fact that the Power Company had a perpetual flowage easement over some of the land and that Mrs. Williams, the owner of the fee, had made an agreement with the United States and that they should not attempt to determine the value of the respective interests of the owner of the fee or of such flowage easement.

The commissioners found that the difference between the fair market value of the total Falkland tract before and after the taking of the easement to flood 1540 acres was $65,520, including all damages to the owners of the adjacent or remaining properties, and that of this sum $11,720 represented damages to the residue of the tract. The judge confirmed this award and the Government on this appeal now contends the award was erroneous, first, because the Power Company was entitled to only nominal damages since the availability of the site for water power development must [fol. 440] be excluded from consideration in making the valuation and second, because in any event the Power Com-

pany was not entitled to any damages to the residue of the estate.

It seems plain to us that the flowage easement of the Power Company had substantial market value in its hands in spite of the fact that the availability of land as a potential-power site is not an element of value to be considered in the condemnation by the United States of a riparian owner's rights. Although it is true that the Power Company could not use the waters of the stream for power purposes except with the approval of the United States,[1] it is equally true that neither the United States nor anyone else could use the land in connection with the stream as a power site so long as the Power Company possessed the flowage easement acquired from the owner of the fee. If Mrs. Williams were the owner of the entire interest in the land, no one would contend that she would not be entitled to compensation for flowage rights whether they were condemned or purchased by the Government or by any other person for navigational or power purposes; and her conveyance of the rights to the Power Company transferred to it the right to compensation for them. Obviously, anyone who desired to acquire the rights would expect to pay for them, and their value, whether in the hands of the owner of the fee or of her grantee, would be what they would bring in the open market.

In regard to this position, the Government says that a transfer or assignment of a claim to compensation from the United States is barred by the Anti-Assignment of Claims Act, 31 U.S.C. §203, which provides that all transfers and [fol. 441] assignments of any claim against the United States are null and void unless made after the allowance of the claim and the ascertainment of the amount due. It is obvious, however, that this statute has no bearing on the point. Mrs. Williams' conveyance was in no sense an assignment of a claim against the United States, for at the time it was made the United States had no interest in the property and no claim against the United States for compensation was in existence. The Power Company acquired title to an interest in the property in the shape of flowage rights by reason of the deed and was the owner thereof at

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[1] See 16 U.S.C. §797(e) et seq.

the time that condemnation proceedings were begun by the United States. It seeks compensation in its own right and not as the assignee of another.[2]

The District Judge determined that the value of the interest of the Power Company for which compensation must be paid was the difference, as found by the commissioners, between the market value of the Falkland tract before and after the taking of the easement by the United States amounting to $65,520, comprising $53,800 with respect to 1540 acres of land up to Contour 321 covered by the Power Company's easement and $11,720 for damages to the residue of the tract. There was abundant evidence to support these figures since the estimates of the real estate experts produced by the Power Company were greatly in excess of the amounts found by the commissioners, and the Government offered no evidence in rebuttal.

[fol. 442] The Government concedes that the measure of value used by the commissioners under the instruction of the court would be proper if the interest of the owner of a fee rather than the interest of the Power Company were being condemned; but the Government contends that this measure is inapposite to the factual situation before the court since it results in awarding to the Power Company the value of the land for such uses as agriculture and forestry to which the Power Company had no claim. We are told that this mistake of the District Court had its origin in our second opinion in this case, where we said, 235 F.2d at p. 329, in obedience to the ruling of the Supreme Court, that the availability of the site for water power development must be excluded in making the valuation of the Power Company's interest, but added that other elements not related to the flow of the stream, such as the value of the land for agricultural or grazing purposes, might be considered.

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[2] The decisions in *United States* v. *Aetna Surety Co.*, 338 U.S. 366, 374, and *United States* v. *Shannon*, 342 U.S. 288, 292, disclose the purposes of the anti-assignment statute and show that transactions within the literal terms of the statute but not within its purposes may be excluded, such as devolutions of title by force of law without any act of the parties, and the right of an insurance company to collect a claim against the United States to which the company has been subrogated by payment to the insured.

When this statement is wrenched from the context in the course of the Government's argument it is undoubtedly incorrect insofar as it indicates that the Power Company was entitled to compensation on the theory that it possessed the right to use the land for agricultural and forestry purposes; but the fact is that we have made no such holding then and make none now. The statement was made in order to eliminate from the computation any consideration of the value of the property as a power site and to confine attention to other elements of value which the property possessed, and it was not irrelevant. On the contrary it had a direct bearing on the question before the court, for the cost of acquiring a permanent flowage easement over agricultural or wooded land is directly related to the uses for which the land is adapted; and if the exercise of the easement destroys these uses, their value determines the market price of the easement. It goes without saying that owners [fol. 443] of farm lands demand at least the value of their lands for agricultural purposes when dealing with purchasers of water power sites, and the Government suffers no injustice in this case when it is required to pay a price which is limited to the value of the lands for ordinary purposes.

The United States complains that the entire amount of the damages to the property has been awarded to the Power Company and none to Mrs. Williams for her interest and hence the United States got no credit for the settlement it made with her as the owner of the fee. The fact is however, as we have shown, that Mrs. Williams had no interest of substantial value in that part of the land covered by the Power Company's easement. She agreed to convey to the United States the right to overflow land to the extent of 1840 acres up to the 330-foot contour line so far as might be necessary for the Government project, subject however to the rights of the Power Company to flood 1540 acres of land up to the 321-foot contour line. In the body of her agreement the purchase price of her rights is stated to be $1.00, and her attorney testified at the hearing below that she made no claim to compensation for the easement over the 1540 acres other than the sum of $1.00 mentioned in the agreement.

In the introductory words of the agreement mention is made of a consideration of $1.00 "and other valuable

considérations"; and there was put in evidence correspondence between her attorney and the manager of the Government project, in which the attorney stated that if the Government would accept a conveyance of her riparian rights between Contours 318 (321) and 330 and would not insist upon taking a fee simple title she would be able to retain and develop 1,000 acres of land for a wild game conservation project, which had been long in use, and that she would [fol. 444] convey the additional easement for a nominal sum. It would appear from the replies received to this offer and from the condemnation proceedings that the suggestion was accepted and, accordingly, the purchase agreement was executed. It is obvious, however, that the additional considerations mentioned in the agreement referred only to the additional territory between Contour 321 and Contour 330 which the Government desired to acquire. The Government was justified in giving nothing to Mrs. Williams for the right to flood this additional area because of her agreement; but we find no justification for the contention that the Government should not pay the Power Company for the interest which it had acquired in the Falkland tract.

The amount which the District Court awarded to the Power Company was limited to the reduction in the fair market value of the Falkland tract as a result of the easement taken by the Government, assuming that such easement involved only the 1,540 acres covered by the Power Company's easement. The Power Company and its predecessors had presumably paid for that easement the fair market value of the 1,540 acres for agricultural purposes plus severance damages to the rest of the tract.

The question as to severance damages arises because the commissioners included the sum of $11,720 for severance damages in the total of $65,520 which they found to be the difference between the fair market value of the Falkland tract before and after the taking by the United States of a flowage easement limited to the extent of the flowage easement which belonged to the Power Company. The judge held that the entire amount should be paid as compensation to the Power Company for the taking of its easement. The Government, without waiving its contention that the Power Company had no compensable interest in the [fol. 445] property, advances the additional argument that

under the settled law severance damages are not allowable in the situation before the court.

The rule ordinarily applicable when a portion of an owner's land is taken in condemnation is that compensation must be paid not only for the land actually taken but also for damages to the remainder of the tract; but the rule contemplates a single piece or tract of land and does not extend to separate tracts which the owner may have in the same neighborhood unless they are so inseparably connected in use that the injury or taking of one necessarily injures the other. It is also generally held that tracts vested in different persons cannot be considered as a whole although used as one.[3] It is apparent, in view of these decisions, that an inquiry into the question of severance damages was appropriate when the Government condemned part of the Falkland tract, which was held in single ownership by Mrs. Williams subject to the Power Company's easement. The easement acquired by the Power Company had not actually severed the 1,540 acres from the rest of the Falkland tract, but gave the Power Company an executory right to sever, which had value and which the United States has appropriated as part of its condemnation. The evidence produced before the commissioners proved the existence and the amount of such damages and was uncontradicted. The amount of such severance damages awarded to the Power Company was lim-
[fol. 446] ited by the assumption, in the question put to the commissioners, that the easement taken by the Government ran only to Contour 321 and therefore involved only the

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[3] *United States* v. *Miller*, 317 U.S. 369, 375-6, 87 L.Ed. 336, 63 S. Ct. 276, 147 A.L.R. 55 (1943); *Bauman* v. *Ross*, 167 U.S. 548, 574, 42 L. Ed. 270, 17 S. Ct. 966 (1897); *United States* v. *Grizzard*, 219 U.S. 180, 184-5, 55 L. Ed. 165, 31 S. Ct. 162, 31 L.R.A., N.S. 1135 (1911); *Baetjer* v. *United States*, 1 Cir., 1944, 143 F.2d 391, 394-5, cert. den. 323 U.S. 772, 89 L. Ed. 618, 65 S. Ct. 131; *United States* v. *Honolulu Plantation Co.*, 9 Cir., 1950, 182 F.2d 172, 176-9, cert. den. 340 U.S. 820, 95 L. Ed. 602, 71 S. Ct. 51 (1950); *United States* v. *Mills*, 8 Cir., 1956, 237 F.2d 401, 6 A.L.R. 2d 1197; [fol. 446] *Cole Investment Co.* v. *United States*, 9 Cir., 1958, 258 F.2d 203; *McIntyre* v. *Board of County Com'rs*, 168 Kan. 115, 211 P.2d 59 (1959); 18 Am. Jur., *Eminent Domain*, § 272, p. 912.

1,540 acres covered by the Power Company's easement. It is of course true that Mrs. Williams and not the Power Company was entitled to the severance damages caused by the taking of the additional easement up to contour level 330, and that she has made a settlement with the Government of all of her claims; but the market value of the interest of the Power Company may nevertheless be measured by what it would cost to acquire it, and this necessarily includes not only the value of the land for agricultural and forestry purposes but also the damages to the remainder of the tract. Anyone who desired to acquire the easement would expect to pay not only the damages suffered by the owner for the destruction of the land for ordinary purposes, but also for the damages inflicted upon the remainder of the tract. The judgment of the District Court will accordingly be affirmed.

Affirmed.

[fol. 447] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7882

UNITED STATES OF AMERICA, Appellant,

vs.

2979.72 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF HALIFAX, VIRGINIA; OLIVE VAUGHAN WILLIAMS, ET AL., AND UNKNOWN OWNERS, (Tract FF-3100E), Appellees

Appeal from the United States District Court for the Western District of Virginia.

JUDGMENT—Filed and Entered October 5, 1959

This cause came on to be heard on the record from the United States District Court for the Western District of Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

October 5, 1959.

Morris A. Soper, United States Circuit Judge.

November 6, 1959, mandate issued and transmitted to the Clerk of the United States District Court at Roanoke, Virginia.

November 6, 1959, record on appeal and original exhibits returned to the Clerk of the United States District Court at Roanoke, Virginia.

[fol. 448] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 449] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1959

No. 757

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—December 30, 1959

Upon Consideration of the application of counsel for petitioner,

It is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 3, 1960.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 30th day of December, 1959.

[fol. 450] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1959

No. 757

UNITED STATES, Petitioner,

vs.

VIRGINIA ELECTRIC AND POWER COMPANY

Order allowing certiorari: April 18, 1960.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1960 857405

LE COPY

No. 757

Office-Supreme Court, U.S.
FILED
MAR 3 1960
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

VIRGINIA ELECTRIC AND POWER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

J. LEE RANKIN,
Solicitor General,
PERRY W. MORTON,
Assistant Attorney General,
ROGER P. MARQUIS,
HAROLD S. HARRISON,
Attorneys,
Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

VIRGINIA ELECTRIC AND POWER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on October 5, 1959.

OPINIONS BELOW

The district court did not write an opinion. The opinion of the court of appeals (App., *infra*, pp. 18–29) is reported at 270 F. 2d 707. Earlier opinions in this case are reported at 218 F. 2d 524, judgment vacated and case remanded, 350 U.S. 956; and at 235 F. 2d 327, rehearing denied, 237 F. 2d 165.

JURISDICTION

The judgment of the court of appeals (App., *infra*, p. 30) was entered October 5, 1959. An extension of

time to March 3, 1960, within which to apply for a writ of certiorari was granted by Mr. Justice Black on December 30, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the United States is required to pay, as compensation for the frustration by condemnation of a flowage easement owned by a power company over land riparian to an interstate navigable stream, the value of the subservient land for agricultural or forestry uses.

2. Whether such compensation must also include so-called severance damage to the remaining part of the tract not embraced in the power company's easement.

STATEMENT

This is a sequel to the case by the same name which was before this Court in No. 41, October Term, 1955, in which certiorari was granted, the judgment below was vacated, and the case was remanded to the court of appeals for further consideration in the light of *United States* v. *Twin City Power Co.*, 350 U.S. 222. *United States* v. *Virginia Electric & Power Co.*, 350 U.S. 956. The facts of the case in its current posture may be summarized as follows:

The Dan River, the principal tributary of the Roanoke River, is a navigable stream. In 1944, Congress, declaring its intention "to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized," approved projects in various areas of the country, including a general plan for the comprehensive de-

velopment of the Roanoke River Basin as "recommended by the Chief of Engineers in House Document Numbered 650, Seventy-eighth Congress, second session." Act of December 22, 1944, 58 Stat 887, 888, 894. By the same Act and in implementation of the Buggs Island Reservoir on the Roanoke River in Virginia and North Carolina [now known as John H. Kerr Dam and Reservoir]," the project here involved. As stated in House Document No. 650, 78th Cong., 2d Sess., the specific navigation purposes of the project are "regulation of stream flow" and "assur[ing] the necessary minimum low flows" for completion of the channel between Palmyra Landing and Weldon in North Carolina (pp. 8–9, 76–77). The other principal objectives are flood control and power production (pp. 8–9, 80–81).

By a suit instituted in the United States District Court for the Western District of Virginia, the United States proceeded to condemn, *inter alia*, a flowage easement over the tract now involved, riparian to the Dan River, required for use in connection with the operation of the John H. Kerr Dam and Reservoir (R. 1–18).[1] The issue was how much compensation was owed for the imposition of that easement and to whom it should be paid.

The United States initially intended to condemn the fee title of this particular tract which is part of a large (7,400 acre) estate (called the Falkland Estate); but, at the urgent request of the fee owner, the estate to be taken was reduced to a flowage ease-

[1] "R." references are to the appendix for the United States filed in the court of appeals.

ment, leaving the owner both with subsurface rights and control of the shore[2] (R. 198-207; App. *infra*, p. 26). In exchange, the fee owner (Mrs. Olive Vaughan Williams) offered an "Option for Purchase of Flowage Easement," accepted on behalf of the United States, in which she settled her claims arising out of the taking of the flowage easement. The instrument recited that it was "in consideration of One Dollar ($1.00) and other valuable considerations" (R. 73). The respondent Power Company held a long-dormant flowage easement over the tract. Its interests in the tract were described in a statement of facts agreed upon at pre-trial conference as (R. 87):

> Water rights, water power and water privileges, including the right to construct and maintain a dam or dams or other works on said lands and to raise the water at the head of Hyco Falls in the Dan River six feet above the usual water level without compensation for damages caused thereby.

The settlement with Mrs. Williams was expressly subject to "such water, flowage, riparian and other rights, if any" of the Power Company (R. 79). Thus, the sole question litigated in this proceeding was the compensation, if any, owing to the Power Company.

Like the claims asserted by the Twin City Power Company in the then pending condemnation cases involving that power company, the Virginia Electric and Power Company here claimed substantial compensation for its rights "due to the location of the land involved and its availability, at the time of the tak-

[2] The easement granted the United States rights of access for project operation purposes (R. 73).

ing and in the reasonably near future, for water power development purposes" (R. 28). Unlike the *Twin City* cases, the alleged value of the respondent Power Company's flowage right was thought to be, in the words of the trial court, "the fee simple value of the land" (R. 57). When the Twin City claim was rejected by this Court, *United States* v. *Twin City Power Co.*, 350 U.S. 222, the Court remanded this case for re-examination in the light of that rejection. *United States* v. *Virginia Electric & Power Co.*, 350 U.S. 956. After reargument, the court of appeals vacated the judgment of the district court and remanded the case, recognizing that availability of the land as a site for water power development could not be considered, but holding that this Court's decision did not exclude compensation for other elements of value, such as for agricultural or grazing purposes, and expressing its views as to how an award should be reached, which was elaborated upon in an opinion denying rehearing. 235 F. 2d 327; 237 F. 2d 165.

On remand, the district court overruled a demand by the United States for a jury trial and appointed commissioners to determine the award to be made to the respondent (R. 106–110). The commissioners were instructed, *inter alia* (R. 112): "In making your determination of fair market value, you should disregard the fact that Virginia Electric and Power Company has a perpetual flowage easement over some of the land involved in this case and that the owner of the fee, Olive Vaughan Williams, and the United States made an option contract dated April 30, 1951, and you are further instructed that you should not

attempt to determine the value of the respective interests of the owner of the fee or of such flowage easement." The district court adopted the commissioners' answer to one of the inquiries propounded to them and accordingly awarded respondent $65,520, an amount even greater than the previous award of $61,600, which had been based upon the fee simple value of the land underlying the claimed flowage rights. The "*res*" valued was the before-and-after value of the Falkland Estate (owned by Mrs. Williams) of some 7,400 acres rather than the respondent's claimed flowage easement involving only some 1,540 acres.[3] Included in the amount awarded was the sum of $11,720, representing so-called severance damages to the residue of the tract (R. 128). In line with references by the court of appeals to value for "agricultural or grazing purposes" (235 F. 2d at pp. 329,

[3] The "Second" inquiry posed to the commissioners, which the district court adopted as the proper measure of value in this case, is (R. 181–182, 186): "*Second:* What is the difference between the fair market value of the Falkland Tract, consisting of 7400 acres, with and without the servitude of the Government's easement, as described in Exhibit B hereto attached, assuming for the purpose of this inquiry that said easement is over the land in Tract FF–3100E up to contour 321 only, involving 1540 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?"

Counsel for the United States made clear its objections to the inquiries and instructions propounded to the commissioners (R. 194, 196). A motion to clarify the record in this respect had also been filed (R. 118–122). The Government additionally submitted requested instructions to the commissioners which were denied by the district court (R. 114–117, 123).

330), the evidence adduced by witnesses for respondent was directed to such uses of the land rather than to the value, if any, of the flowage easements constituting its claim of interest. The Government again appealed. The court of appeals again affirmed the award.

REASONS FOR GRANTING THE WRIT

1. The Power Company's easements were held and could be used only for the development of water power (R. 28; *supra*, pp. 4–5). It had no right to use the land for agricultural, grazing, or forestry purposes. When this Court held that the Power Company could not recover compensation on account of the frustration of its right so to develop the water power, by virtue of the exercise of the overriding federal commerce power, it would surely seem that the easement no longer had any substantial value since it is a truism that property that cannot be used is valueless. The view that, despite this Court's *Twin City* decision (*supra*, pp. 2, 5), the flowage easement of a power company would nevertheless have substantial value first appeared in this case on remand to the Fourth Circuit (235 F. 2d at 329–330; 237 F. 2d at 166; *supra*, p. 5) and was, by the Fourth Circuit, carried over to the *Twin City* case in connection with valuing the fee-owned lands of the Twin City Company. That company was, of course, entitled to compensation for its fee title land based upon uses other than water power development, but the court spoke in that case as if the flowage easement itself had other value.

United States v. *Twin City Power Company*, 248 F. 2d 108 (C.A. 4), certiorari denied, 356 U.S. 918.[4]

Including opinions on rehearing, the Fourth Circuit has now discussed this subject five times. The same view was adopted by the district court in Georgia upon assertion of the same claims by the Augusta Power Company. That case (*Augusta Power Company* v. *United States* (and reverse title) (C.A. 5, No. 18150)) is now awaiting decision by the United States Court of Appeals for the Fifth Circuit, having been argued on February 17, 1960. The several opinions of the various courts, as well as the arguments advanced to the Fifth Circuit, have made clear, what was perhaps earlier obscure, that the basis for these awards to power companies is that, while they had the right only to flood the lands for purpose of a water power development, that right gave them the potentiality of destroying agricultural and other uses and they must be paid for frustration of that possibility, measured by the amount the power company would have to pay the fee owner for such rights at the date of taking. Our short answer is that to charge the United States any price for such frustration would be simply to charge it indirectly for the exercise of the sovereign commerce power to develop navigable streams. Nothing in eminent domain law justifies such a result, and the *Twin City* ruling holds to the contrary.

2. The five opinions of the Fourth Circuit also show that it gives great importance to a completely irrelevant factor, *i.e.*, the rights of the fee owner. That

[4] Although appealing on other grounds to the Fifth Circuit, the Twin City Company did not present this issue to that court. *United States* v. *Twin City Power Company of Georgia*, 253 F. 2d 197, 205.

this element is irrelevant is seen if one considers the comparable case which would be presented under the established alternate procedure for exercising eminent domain. That alternate method is physical seizure, leaving anyone injured to his suit against the United States under the Tucker Act. But it is plain that, whatever the procedure, the amount of compensation is the same. *Hurley* v. *Kincaid*, 285 U.S. 95, 104; *United States* v. *Dow*, 357 U.S. 17, 21. In a Tucker Act suit by the power company, claims of interference with agriculture or timber uses—uses of which the utility company could not avail itself—would obviously be irrelevant. For in such a case the burden would be on the company to demonstrate how *it* had been injured by the government flooding of the land. The only interference with the *company's* interests would be with prospective flooding for power purposes, and that is precisely the value excluded by this Court's *Twin City* decision. The case here is exactly the same.

Perhaps the court of appeals was misled by the fact that the Power Company was joined as a defendant in the condemnation proceeding. That was done simply to furnish that company a forum for assertion of its claims, which the United States believed to be valueless. This Court's recent decision in *United States* v. *93.970 Acres*, 360 U.S. 328, shows that such joinder in a condemnation suit may properly be done without prejudice to any claim or defense of the United States.

The fundamental fallacy in the Fourth Circuit's reasoning is likewise clear from the settled principle

that the fact that the Government has settled with one of several condemnees is not to be ignored, nor does it enlarge the rights of the others or entitle them to compensation for more than the legal interest they themselves have in the property. *United States* v. *Petty Motor Co.*, 327 U.S. 372, 376; *Messer* v. *United States*, 157 F. 2d 793, 795 (C.A. 5); *Southern California Fisherman's Ass'n* v. *United States*, 174 F. 2d 739, 740 (C.A. 9). In this case, the United States had settled with the fee owner on her own terms and to her entire satisfaction (R. 47, 198–207; App., *infra*, p. 26; *supra*, pp. 3–4). But, under the instructions and inquiries to the commissioners, the United States received no consideration for its settlement with the fee owner. On the contrary, the commissioners were advised by the court: "* * * you are further instructed that you should not attempt to determine the value of the respective interests of the owner of the fee or of such flowage easement" (R. 112)—the latter being the sole thing for valuation in these proceedings. As stated in *Messer* v. *United States*, 157 F. 2d 793, 795, fn. 5 (C.A. 5):

> Where, as here, the Government settles with the owner of one interest, the question of compensation for all interests is irrelevant; only the question of just compensation for the interest taken concerns the Government. United States v. Petty Motor Co., 1946, 327 U.S. 372, 374, 66 S. Ct. 372.

See, also, *Mayor and City Council of Baltimore* v. *United States*, 147 F. 2d 786, 789 (C.A. 4).

The only compensation payable by the United States, whether the taking be in condemnation pro-

ceedings or by physical seizure followed by a Tucker Act suit, is to those with whose use of the property the taking has interfered. Here, they were the farmers or the timbermen, not the Power Company, and for such interferences full settlement has been made with the fee owner. The Power Company's approach would measure, at most, what it or another power company would have had to pay the landowners, before the taking, for the flowage rights. That, of course, is now beside the point. The question now is what, if any, *actual uses of the Power Company* were interfered with by the taking. The answer is plainly none.[5]

The Fourth Circuit has repeated in its various opinions (see *United States* v. *Twin City Power Company*, 248 F. 2d 108, at pp. 113–114, 115; App., *infra*,

[5] When the owners have, by their own division of title, lessened the value of the whole, the United States is not required to pay more than the market value of the individual interests, even though the total of those separated interests is less than the value of the whole if not so divided. *Boston Chamber of Commerce* v. *Boston*, 217 U.S. 189, 195; *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 76, 80; *Mayor and City Council of Baltimore* v. *United States*, 147 F. 2d 786, 789 (C.A. 4). In the instant case, the unencumbered fee value clearly did not exist in either property interest. The fee underlying the flowage easement condemned by the United States, having already been burdened by prior "floodage" rights, had undoubtedly suffered some diminution in value—if only because of the nuisance of a clouded title. On the other hand, the Power Company, plainly not being entitled to fee value because it did not own the fee, or to water power value against the United States in a navigable stream (*United States* v. *Twin City Power Co.*, 350 U.S. 222), failed to show—and, factually, cannot show—any substantial value for its claimed flowage rights.

p. 19) that the United States, under the rule we advocate, would be getting something for nothing. In the first place this is legally immaterial, since the owners' award "cannot be enhanced by any gain to the taker" (*United States* v. *Miller*, 317 U.S. 369, 375). More important, it is based on a misunderstanding of our position which is erroneously asserted to be (*Twin City, supra*, 248 F. 2d at 114) that "the owner of the fee cannot recover for the flooding because he has parted with the flowage easement". We have never so contended. Existence of the flowage easement diminished fee value only to the extent that there was a reasonable probability of its exercise and thereby a potential interference with agricultural and forestry uses. The circumstances of this case, where the easements (created in 1907, R. 229–236) were dormant and there was no sign of intent or ability of the Power Company to exercise them, indicated that their existence would have only minor effect on the value of the fee.[6] Dollars-and-cents proof of this fact is not present in this case because the Government settled with the fee owner on mutually agreeable terms.[7] In any event, a belief that in accepting the

[6] Factors such as availability of funds for development, difficulties of assemblage of all necessary lands, the increasing economic advantage of steam plants over hydroelectric plants, the need for additional power in the particular area, etc., may be such that the flowage easements are never exercised and are, for all practical purposes, abandoned.

[7] It is present in the *Augusta Power Co.* case in the Fifth Circuit where the Government paid fee value to the landowners and the power company is also claiming full value to the date of taking. The power company is there relying upon the imminence of the government flooding as proving lack of remaining value in the fee owner.

terms offered by the fee owner the United States acted unfairly to her is no ground for making a substantial award to the Power Company to which it was not entitled.[8]

3. Severance damages are to be paid when the taking of a portion of land in one ownership has diminished the value of the remaining part. In such a case, just compensation for the taking includes the lessened value of the residue. *E.g., Bauman* v. *Ross,* 167 U.S. 548, 574; *United States* v. *Grizzard,* 219 U.S. 180, 183; *United States* v. *Honolulu Plantation Co.,* 182 F. 2d 172 (C.A. 9), certiorari denied, 340 U.S. 820. In the words of the court in the last-cited case (pp. 175–176): "The rule applies exclusively to condemnation of fee simple title of a tract in one ownership."[9] In addition to the "fee simple title" limita-

[8] Insofar as respondent is concerned, the Fourth Circuit's emphasis on the cost to it of obtaining the easement is plainly erroneous. The actual cost to the Power Company in 1907 does not appear; in any event, "Original cost is well termed the 'false standard of the past' where, as here, present market value in no way reflects that cost". *United States* v. *Toronto Nav. Co.,* 338 U.S. 376, 403. As we have indicated, the present value of respondent's easement bears no relation to the cost of creation of the easement. It is settled that, where the easement has not been proved to be of any value, no damages, or at best nominal damages, are sustained upon condemnation. See *Northern Pac. Ry. Co.* v. *North American Tel. Co.,* 230 Fed. 347, 354–359 (C.A. 8), and cases there discussed.

[9] The court of appeals was there even more explicit. It stated (182 F. 2d at pp. 178–179): "The rule requiring compensation for loss in market value of the remainder of the tract is applied strictly only where there is but a single parcel *owned by one party in fee simple.* An extension of the doctrine permitted the inclusion of another parcel *in the same ownership* if it lay contiguous to the principal tract. * * * With some

tion, which alone would bar damages to the residue here, it is clear that the Ninth Circuit had much support in stating that the rule applies only to a tract in one ownership. *State* v. *Superior Court for Spokane County*, 10 Wash. 2d 362, 371, 116 P. 2d 752, 756; *McIntyre* v. *Board of County Com'rs*, 168 Kan. 115, 118–121, 211 P. 2d 59, 63–64; *Conness* v. *Indiana, I. & I. R. Co.*, 193 Ill. 464, 470–471, 62 N.E. 221, 223; *Glendenning* v. *Stahley*, 173 Ind. 674, 683–684, 91 N.E. 234, 238; *Tillman* v. *Lewisberg & N. R. Co.*, 133 Tenn. 554, 182 S.W. 597; *Duggan* v. *State*, 214 Iowa 230, 233, 242 N.W. 98, 99. As shown by these cases, different interests, even when held by husband and wife, brother and sister, or parent and child, do not warrant recovery of severance damages. While the court of appeals in the instant case purports to recognize the general rule that tracts vested in different persons cannot be considered as a whole for severance damage purpose (App., *infra*, pp. 27–29), the court fails to appreciate the scope of the principle under which different titles vested in different persons have repeatedly been held inadequate support for an award of severance damages.

Here, Mrs. Williams' interest was the fee title of all the tract. Respondent had an entirely different interest, claimed flowage rights (characterized by the court of appeals as "an executory right to sever")

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reluctance, the courts have held that the owner of one parcel *in fee* may be compensated for loss in market value thereof as a result of the taking of another parcel *owned in fee by him*, even if the latter is not contiguous, provided that, by actual and permanent use, a unitary purpose is served by both parcels * * *." (Emphasis added.).

over part of the land. Thus, we are clearly not dealing in this case with an instance of "condemnation of fee simple title of a tract in one ownership" to which the Ninth Circuit has held the rule of severance damages applies exclusively (182 F. 2d at pp. 175–176). It is no answer to say that, if the Power Company had been condemning an easement over Mrs. Williams' land, it would have had to pay *her* severance damages. The Power Company has no real interest in Mrs. Williams' various lands, yet the United States is now required to pay so-called severance damages *to the Power Company* for those lands. Moreover, any "severance damage" to flowage easements over land not embraced in the Government's condemnation would have to be based on some theory of interference with or frustration of a right to development of water power—contrary to this Court's ruling in *Twin City*.

4. In our view, the problem presented in this petition is developing into a serious one. Power companies will not be loath to seize upon the decisions in this case in an effort to give value to long-dormant—and for all practical purposes abandoned—flowage easements. The Fourth Circuit's present insistence upon its earlier ruling in this case, and its application of the same ruling in *Twin City* (248 F. 2d 108, *supra*), have demonstrated that its holding represents its considered view. Some district courts outside of the Fourth Circuit have relied upon that circuit's holding, to the detriment of the public which has been required to pay twice for the same property values. One such case is the *Augusta Power* case now awaiting decision

in the Fifth Circuit (*supra*, p. 8). Others will probably occur in the future. It is our understanding that, particularly in the earlier years of this century, it was the regular practice of many power companies to acquire easements in substantial numbers for possible development of water power sites as favorable circumstances might occur. In view of the continued acquisition of lands subject to power company flowage easements in connection with navigation improvement and other river and harbor projects, we believe that the errors and conflicts discussed in this petition should be resolved quickly.

We are not unmindful that the issues in this case were, in part, a subordinate point (pp. 14–18) in our petition for certiorari in *United States* v. *Twin City Power Co.*, No. 785, Oct. Term, 1957, certiorari denied, 356 U.S. 918. The primary ground of that petition related to lands owned in fee by the Power Company and the judgment as to the flowage easement question was not final since that issue had been remanded for trial. In contrast, the present decision is a final one; courts beyond the Fourth Circuit have followed its decision; the subsequent decisions and opinions, particularly the addition of the element of severance damage, have clarified the issue; and, finally, this Court's decisions in the *Dow* and *93.970 Acres* cases, *supra*, have intervened. For these reasons we think re-examination of the matter is warranted.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 1960.

APPENDIX

In the United States Court of Appeals for the Fourth Circuit

No. 7882

UNITED STATES OF AMERICA, APPELLANT

v.

2979.72 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF HALIFAX, VIRGINIA, OLIVE VAUGHAN WILLIAMS, ET AL., AND UNKNOWN OWNERS (TRACT FF-3100E), APPELLEES

Appeal From the United States District Court for the Western District of Virginia, at Roanoke

JOHN PAUL, *District Judge*

(Argued June 24, 1959—Decided October 5, 1959)

Before SOPER and HAYNSWORTH, *Circuit Judges,* and THOMSEN, *District Judge*

SOPER, *Circuit Judge:*

The principal question in this case is whether an electric power company, which purchased from a riparian owner the right to flood the land, is entitled to any compensation when the United States takes over the right from the power company by condemnation. The owner of the fee in the land, having conveyed the flowage rights to the power company and thereby destroyed the value of the fee, agreed to convey the fee to the United States for $1.00, subject to the power company's rights, and the Government contends that the power company should be paid no more

because its right to flood the land has no value since it has no right to use the waters of the stream. If the Government's position is sustained, it will pay nothing for the right to flood the land and use it in connection with its flood control project.

The case first came before us in United States v. 2979.72 Acres of Land, 218 F. 2d 524. Condemnation proceedings by the United States were taken in connection with the John K. Kerr Dam and Reservoir, a flood control project on the Roanoke River in Virginia and North Carolina. In issue was the value of 1540 acres of land which the Virginia Electric and Power Company had an easement to flood permanently under a conveyance from Mrs. Olive Vaughan Williams, the owner of the fee. Mrs. Williams had agreed to convey to the Government for $1.00 any interest she may have retained in the land; and the value of the Power Company's interest was the question for decision in the condemnation proceedings to which both Mrs. Williams and the Power Company were made parties. The District Court found that the Power Company was entitled to recover $61,600 for the fee simple value of the land at $40.00 per acre and the Government appealed on the grounds (1) that in fixing the value of the land consideration had been improperly given to its availability for the development of a water power project in a navigable river, and (2) that in any event the Government was not liable for the fee simple value of the land but only for the difference between its value before and after the grant of the easement acquired by the United States.

We rejected the first ground for the reasons set forth in our opinion in United States v. Twin City Power Co., 215 F. 2d 592; where we held that the availability of land as a potential power site on a

navigable stream constituted an element of value for which just compensation must be made. On the second ground we also upheld the conclusion of the trial court. Since the evidence showed that the right to flood the land permanently left no use of any value to the owner of the fee and that land worth $40.00 an acre before the servitude of the easement was imposed was worth nothing thereafter, we found that the difference between the value of the land before and after the grant of the easement was the same as the fee simple value of the land.

Subsequently our decision in the *Twin City* case was reversed by the Supreme Court in United States v. Twin City Power Co., 350 U.S. 222, 76 S. Ct. 259, 100 L. Ed. 240, and it was held that, in condemnation of riparian land by the United States in order to improve the navigation of the stream, just compensation does not include the value of the water power in the flow of the stream; and, since we had not followed this rule, certiorari was granted in United States v. 2979.72 Acres of Land, supra, the judgment therein was vacated and the case was remanded to us for further consideration in the light of the Supreme Court's decision.

Accordingly, we reconsidered the case in United States v. 2979.72 Acres of Land, 235 F. 2d 327. In our opinion we pointed out that although the availability of the land as a site for water power development could not be considered in assessing damages against the United States, nothing in the opinion of the Supreme Court held that compensation should not be paid for other elements of value, such as value for agricultural or grazing purposes. In answer to the contention of the Government that the Power Company was entitled to receive nothing for the reason that its flowage rights were of value only for the purposes of water power development, we held that the

conveyance of the flowage rights by the owner of the fee to the Power Company vested in the latter an interest in the land that was being taken by the Government in condemnation therefor. The judgment of the District Court was accordingly vacated and the case remanded with direction to award compensation to the Power Company for the difference between the value of the land with and without the servitude of the easement, excluding from the valuation in both instances any element of value arising from the availability of the land for water power purposes. Subsequently, a petition for rehearing filed by the United States was denied, 4 Cir., 237 F. 2d 165.

On remand the District Court appointed commissioners to determine the amount of compensation to be paid by the United States. The area of 1540 acres of land over which the Power Company had a flowage easement was part of a larger tract of 7400 acres known as the Falkland tract. The easement of the Power Company comprised the right of permanent flowage over 1540 acres of the land up to a contour level of 321-feet, while the easement condemned by the Government involved the right of permanent and intermittent flowage over 1840 acres of land up to a level of 330-feet; and it was essential for the Government to acquire what the Power Company owned. The judge directed the commissioners to answer an inquiry, amongst others, as to what was the difference between the fair market value of the total Falkland tract with and without the servitude of the Government's easement, assuming that the easement was over the land up to contour 321 only, involving 1540 acres, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream. The commissioners

were further instructed that in making their determination of fair market value they should disregard the fact that the Power Company had a perpetual flowage easement over some of the land and that Mrs. Williams, the owner of the fee, had made an agreement with the United States and that they should not attempt to determine the value of the respective interests of the owner of the fee or of such flowage easement.

The commissioners found that the difference between the fair market value of the total Falkland tract before and after the taking of the easement to flood 1540 acres was $65,520, including all damages to the owners of the adjacent or remaining properties, and that of this sum $11,720 represented damages to the residue of the tract. The judge confirmed this award and the Government on this appeal now contends the award was erroneous, first, because the Power Company was entitled to only nominal damages since the availability of the site for water power development must be excluded from consideration in making the valuation and, second, because in any event the Power Company was not entitled to any damages to the residue of the estate.

It seems plain to us that the flowage easement of the Power Company had substantial market value in its hands in spite of the fact that the availability of land as a potential power site is not an element of value to be considered in the condemnation by the United States of a riparian owner's rights. Although it is true that the Power Company could not use the waters of the stream for power purposes except with the approval of the United States,[1] it is equally true that neither the United States nor anyone else could use the land in connection with the stream as a power

[1] See 16 U.S.C.A. § 797(e) et seq.

site so long as the Power Company possessed the flowage easement acquired from the owner of the fee. If Mrs. Williams were the owner of the entire interest in the land, no one would contend that she would not be entitled to compensation for flowage rights whether they were condemned or purchased by the Government or by any other person for navigational or power purposes; and her conveyance of the rights to the Power Company transferred to it the right to compensation for them. Obviously, anyone who desired to acquire the rights would expect to pay for them, and their value, whether in the hands of the owner of the fee or of her grantee, would be what they would bring in the open market.

In regard to this position, the Government says that a transfer or assignment of a claim to compensation from the United States is barred by the Anti-Assignment of Claims Act, 31 U.S.C.A. § 203, which provides that all transfers and assignments of any claim against the United States are null and void unless made after the allowance of the claim and the ascertainment of the amount due. It is obvious, however, that this statute has no bearing on the point. Mrs. Williams' conveyance was in no sense an assignment of a claim against the United States, for at the time it was made the United States had no interest in the property and no claim against the United States for compensation was in existence. The Power Company acquired title to an interest in the property in the shape of flowage rights by reason of the deed and was the owner thereof at the time that condemnation proceedings were begun by the United States. It seeks compensation in its own right and not as the assignee of another.[2]

[2] The decisions in United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 374, 70 S. Ct. 207, 94 L. Ed. 171, and United States v.

The District Judge determined that the value of the interest of the Power Company for which compensation must be paid was the difference, as found by the commissioners, between the market value of the Falkland tract before and after the taking of the easement by the United States amounting to $65,520, comprising $53,800 with respect to 1540 acres of land up to Contour 321 covered by the Power Company's easement and $11,720 for damages to the residue of the tract. There was abundant evidence to support these figures since the estimates of the real estate experts produced by the Power Company were greatly in excess of the amounts found by the commissioners, and the Government offered no evidence in rebuttal.

The Government concedes that the measure of value used by the commissioners under the instruction of the court would be proper if the interest of the owner of a fee rather than the interest of the Power Company were being condemned; but the Government contends that this measure is inapposite to the factual situation before the court since it results in awarding to the Power Company the value of the land for such uses as agriculture and forestry to which the Power Company had no claim. We are told that this mistake of the District Court had its origin in our second opinion in this case, where we said, 235 F.2d at p. 329, in obedience to the ruling of the Supreme Court, that the availability of the site for water power development must be excluded in mak-

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Shannon, 342 U.S. 288, 292, 72 S. Ct. 286, 96 L. Ed. 321, disclose the purposes of the anti-assignment statute and show that transactions within the literal terms of the statute but not within its purposes may be excluded, such as devolutions of title by force of law without any act of the parties, and the right of an insurance company to collect a claim against the United States to which the company has been subrogated by payment to the insured.

ing the valuation of the Power Company's interest, but added that other elements not related to the flow of the stream, such as the value of the land for agricultural or grazing purposes, might be considered.

When this statement is wrenched from the context in the course of the Government's argument it is undoubtedly incorrect insofar as it indicates that the Power Company was entitled to compensation on the theory that it possessed the right to use the land for agricultural and forestry purposes; but the fact is that we made no such holding then and make none now. The statement was made in order to eliminate from the computation any consideration of the value of the property as a power site and to confine attention to other elements of value which the property possessed, and it was not irrelevant. On the contrary it had a direct bearing on the question before the court, for the cost of acquiring a permanent flowage easement over agricultural or wooded land is directly related to the uses for which the land is adapted; and if the exercise of the easement destroys these uses, their value determines the market price of the easement. It goes without saying that owners of farm lands demand at least the value of their lands for agricultural purposes when dealing with purchasers of water power sites, and the Government suffers no injustice in this case when it is required to pay a price which is limited to the value of the lands for ordinary purposes.

The United States complains that the entire amount of the damages to the property has been awarded to the Power Company and none to Mrs. Williams for her interest and hence the United States got no credit for the settlement it made with her as the owner of the fee. The fact is, however, as we have shown, that Mrs. Williams had no interest of substantial value

in that part of the land covered by the Power Company's easement. She agreed to convey to the United States the right to overflow land to the extent of 1840 acres up to the 330-foot contour line so far as might be necessary for the Government project, subject however to the rights of the Power Company to flood 1540 acres of land up to the 321-foot contour line. In the body of her agreement the purchase price of her rights is stated to be $1.00, and her attorney testified at the hearing below that she made no claim to compensation for the easement over the 1540 acres other than the sum of $1.00 mentioned in the agreement.

In the introductory words of the agreement mention is made of a consideration of $1.00 "and other valuable considerations"; and there was put in evidence correspondence between her attorney and the manager of the Government project, in which the attorney stated that if the Government would accept a conveyance of her riparian rights between Contours 318 (321) and 330 and would not insist upon taking a fee simple title she would be able to retain and develop 1,000 acres of land for a wild game conservation project, which had been long in use, and that she would convey the additional easement for a nominal sum. It would appear from the replies received to this offer and from the condemnation proceedings that the suggestion was accepted and, accordingly, the purchase agreement was executed. It is obvious, however, that the additional considerations mentioned in the agreement referred only to the additional territory between Contour 321 and Contour 330 which the Government desired to acquire. The Government was justified in giving nothing to Mrs. Williams for the right to flood this additional area because of her agreement; but we find no justification

for the contention that the Government should not pay the Power Company for the interest which it had acquired in the Falkland tract.

The amount which the District Court awarded to the Power Company was limited to the reduction in the fair market value of the Falkland tract as a result of the easement taken by the Government, assuming that such easement involved only the 1,540 acres covered by the Power Company's easement. The Power Company and its predecessors had presumably paid for that easement the fair market value of the 1,540 acres for agricultural purposes plus severance damages to the rest of the tract.

The question as to severance damages arises because the commissioners included the sum of $11,720 for severance damages in the total of $65,520 which they found to be the difference between the fair market value of the Falkland tract before and after the taking by the United States of a flowage easement limited to the extent of the flowage easement which belonged to the Power Company. The judge held that the entire amount should be paid as compensation to the Power Company for the taking of its easement. The Government, without waiving its contention that the Power Company had no compensable interest in the property, advances the additional argument that under settled law severance damages are not allowable in the situation before the court.

The rule ordinarily applicable when a portion of an owner's land is taken in condemnation is that compensation must be paid not only for the land actually taken but also for damages to the remainder of the tract; but the rule contemplates a single piece or tract of land and does not extend to separate tracts which the owner may have in the same neighborhood unless they are so inseparably connected in use that

the injury or taking of one necessarily injures the other. It is also generally held that tracts vested in different persons cannot be considered as a whole although used as one.[3] It is apparent, in view of these decisions, that an inquiry into the question of severance damages was appropriate when the Government condemned part of the Falkland tract, which was held in single ownership by Mrs. Williams subject to the Power Company's easement. The easement acquired by the Power Company had not actually severed the 1540 acres from the rest of the Falkland tract, but gave the Power Company an executory right to sever, which had value and which the United States has appropriated as part of its condemnation. The evidence produced before the commissioners proved the existence and the amount of such damages and was uncontradicted. The amount of such severance damages awarded to the Power Company was limited by the assumption, in the question put to the commissioners, that the easement taken by the Government ran only to Contour 321 and therefore involved only the 1540 acres covered by the Power Company's easement. It is of course true that Mrs. Williams and not the Power

[3] United States v. Miller, 1943, 317 U.S. 369, 375–376, 63 S. Ct. 276, 87 L. Ed. 336, 147 A.L.R. 55; Bauman v. Ross, 1897, 167 U.S. 548, 574, 17 S. Ct. 966, 42 L. Ed. 270; United States v. Grizzard, 1911, 219 U.S. 180, 184–185, 31 S. Ct. 162, 55 L. Ed. 165, 31 L.R.A., N.S., 1135; Baetjer v. United States, 1 Cir., 1944, 143 F. 2d 391, 394–395, certiorari denied, 323 U.S. 772, 65 S. Ct. 131, 89 L. Ed. 618; United States v. Honolulu Plantation Co., 9 Cir., 1950, 182 F. 2d 172, 176–179, certiorari denied, 1950, 340 U.S. 820, 71 S. Ct. 51, 95 L. Ed. 602; United States v. Mills, 8 Cir., 1956, 237 F. 2d 401, 6 A.L.R. 2d 1197; Cole Investment Co. v. United States, 9 Cir., 1958, 258 F. 2d 203; McIntyre v. Board of County Com'rs, 1959, 168 Kan. 115, 211 P. 2d 59; 18 Am. Jur., Eminent Domain, § 272, p. 912.

Company was entitled to the severance damages caused by the taking of the additional easement up to contour level 330, and that she has made a settlement with the Government of all of her claims; but the market value of the interest of the Power Company may nevertheless be measured by what it would cost to acquire it, and this necessarily includes not only the value of the land for agricultural and forestry purposes but also the damages to the remainder of the tract. Anyone who desired to acquire the easement would expect to pay not only the damages suffered by the owner for the destruction of the land for ordinary purposes, but also for the damages inflicted upon the remainder of the tract. The judgment of the District Court will accordingly be affirmed.

Affirmed.

JUDGMENT

Filed and entered October 5, 1959

In the United States Court of Appeals for the Fourth Circuit

No. 7882

UNITED STATES OF AMERICA, APPELLANT

v.

2979.72 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF HALIFAX, VIRGINIA, OLIVE VAUGHAN WILLIAMS, ET AL., AND UNKNOWN OWNERS (TRACT FF-3100E), APPELLEES

Appeal from the United States District Court for the Western District of Virginia

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

MORRIS A. SOPER,
United States Circuit Judge.

October 5, 1959.

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FILE COPY

No. ~~357~~ 49

In the

Supreme Court of the United States

October Term, 1959

UNITED STATES OF AMERICA,
Petitioner

v.

VIRGINIA ELECTRIC AND POWER COMPANY,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AND APPENDIX FOR THE RESPONDENT IN OPPOSITION

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In the

Supreme Court of the United States

October Term, 1959

No. 757

UNITED STATES OF AMERICA,
Petitioner

v.

VIRGINIA ELECTRIC AND POWER COMPANY,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION*

OPINIONS BELOW

The judgment-order of the District Court (U. S. App. 178-188) is unreported and is printed in the Appendix hereto, *infra*, pages 13-20. The opinion of the Court of Appeals (Pet., App. 18-29) is reported at 270 F. 2d 707. Earlier opinions in this case are reported at 218 F. 2d 524;

* References to the Appendix to this brief are shown as "App.," to the Appendix to the petition as "Pet. App.," and to the appendices filed in the court below: the Appendix for the United States as "U. S. App." and the Appendix for Virginia Electric and Power Company as "Vepco App.," followed by the appropriate page number.
All emphasis in this brief has been added unless otherwise indicated.

judgment vacated and case remanded at 350 U. S. 956; on remand at 235 F. 2d 327, and rehearing denied at 237 F. 2d 165.[1]

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

Respondent cannot accept Petitioner's statement of the Questions Presented (Pet. 2) because they are not expressed in the terms and circumstances of the case but are hypothetical and unsupported by the record.

This was a proceeding *in rem* by the United States for the condemnation of a flowage easement over fast land riparian to a navigable stream, where the issues were the amount of just compensation for the Government's flowage easement over 1840 acres of a 7400 acre tract and the allocation of such compensation to the owners of interests in such land to the extent of the value of their respective interests. Just compensation of $70,920 for the Government's flowage easement was determined on the basis of the difference in value of the servient land before and after the taking of such easement, excluding from the valuation in both instances any element of value arising from the availability of the land for water power purposes.

The Power Company had previously acquired from the fee owner an easement to flood *permanently* 1540 acres of the 7400 acre tract, within the 1840 acres which were later subjected to the Government's flowage easement. As compensa-

[1] All of these opinions are printed in U. S. App. 93-100b. For the convenience of the Court we have included in the Appendix to this brief the district court's order appointing commissioners, the instructions and the report of the commissioners (App. 1-4, 5-6, 7-12).

tion for its aforesaid interest in the land, the district court held that the Power Company was entitled to share in the award to the extent of the value of its interest, amounting to $65,520, a sum equivalent to what would have been the compensation for the Government's flowage easement over the same 1540 acres of the 7400 acre tract. The owner of the underlying fee, having agreed in an option contract with the Government to accept $1.00 for her interest in the land expressly subject to the Power Company's flowage easement, made no further claim to the remaining $5400 of the just compensation for the Government's flowage easement.

Thus, the only questions which can now be fairly presented are:

1. Whether this Court should review the decision below holding that the owner of a valid and existing flowage easement was entitled to compensation therefor.

2. Whether this Court should review the decision below approving the district court's holding that the owner of an easement to flood permanently 1540 acres of the 7400 acre tract was entitled to a share in the award of just compensation for the Government's flowage easement for an amount equivalent to what would have been the compensation for the Government's flowage easement over the same 1540 acres of the 7400 acre tract.

3. Whether the decision below is in conflict with the decisions of this Court or with decisions of other courts of appeal.

STATEMENT OF THE CASE

The Government's statement of the "facts of the case in its current posture" (Pet. 2) does not present an adequate picture of the case. The facts material to the consideration

of the questions presented are stated below.

Under a declaration of taking filed October 23, 1952, and the deposit of estimated compensation of $1.00, the United States acquired a perpetual easement "to overflow, permanently or intermittently, as may be necessary for the construction, maintenance and operation of the John H. Kerr Dam and Reservoir,"[2] 1840 acres of a 7400 acre tract, known as the Falkland Estate, riparian to the Dan River in Halifax County, Virginia. On the same day, the United States also filed a complaint in an *in rem* proceeding "for the taking of property under the power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest."[3] describing the flowage easement taken by the Government and the land involved. The fee owner was a named party.

Neither the declaration of taking nor the complaint stated that the Power Company had any interest in the property. The complaint recognized that there might be others who might "have or claim some interest in the property taken," and they were made parties to the proceeding under the designation "Unknown Ow[illegible]"[4] The Power Company, however, received a notice [illegible]sing that the complaint had been filed and that at the trial of the issue of just compensation, the Power Company could "present evidence as to the amount of compensation to be paid for the property in which [it had] an interest and [the Power Company] might share in the distribution of the award of compensation."[5]

The Power Company filed notice of appearance, stating that it had an interest in the property and reserving the

[2] U. S. App. 10-18 at 11.
[3] U. S. App. 1-10 at 1-2.
[4] U. S. App. 3.
[5] Vepco App. 3-5, esp. 5.

right to contest the issue of just compensation for the Government's easement thereon and to present evidence of the value of such property and of the Power Company's interest therein.[6]

Subsequently, the parties stipulated that on October 23, 1952, the Power Company had an easement to flood permanently 1540 acres of the 7400 acre tract, within the 1840 acres embraced by the Government's flowage easement.[7] Contrary to the statements in the Government's petition (Pet. 12 and footnote 8 on page 13), the Power Company's flowage easement was acquired from the fee owner in 1925 (U. S. App. 18-20, 217-223) and was not, as the Government alleges, "for all practical purposes abandoned" (Pet. 15; cf. U. S. App. 47-56).

In an option contract dated April 30, 1951, made in consideration of $1.00 and "other valuable considerations," the owner of the underlying fee had agreed to convey to the United States the right to overflow the land to the extent of 1840 acres as might be necessary for the Government's project, *expressly* subject however to the rights of the Power Company to flood 1540 acres of such land.[8] Although the Government had exercised this option, the fee owner made no conveyance, and the Government made the fee owner a party to the declaration of taking and the condemnation proceeding for the purpose of acquiring her interest.[9] The

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[6] Vepco App. 6.

[7] Stipulation of Facts, par. 7, 8, 9, and 11, U. S. App. 84 at 86-88. The Government's statement of Vepco's interest (Pet. 4) is not correct.

[8] Government Exhibit 1; U. S. App. 72-84.

[9] Vepco App. 25-26, Government's Answers to Vepco's Interrogatories 5 and 6, Vepco App. 22. Also, U. S. App. 81 par. (6) of the option contract; Vepco App. 152. The Government's petition would indicate that the settlement with the fee owner was an accomplished fact. That is misleading because as yet no order has been entered for the payment to the fee owner of the agreed consideration of $1.00 for her interest, although the Government's attorney had prepared a sketch thereof, Vepco App. 130.

Government conceded that it had "acquired nothing" under this option contract and at the trial on January 18, 1954, its objection to any evidence regarding the fee owner's reasons for making such an agreement was sustained.[10]

We will not repeat the long history of this case from the first trial until the cause was remanded to the district court,[11] for that is succinctly reviewed in the court of appeals' opinion of October 5, 1959 (270 F. 2d 707, 709-710; Pet. App. 19-21). It should be pointed out, however, that until the Government's Petition for Rehearing was filed on August 30, 1956, the Government had taken the position that in any event the Government would only be liable for the difference in value of the land with and without the servitude of the easement acquired by the Government.[12] The Government's arguments then being that the infrequency of flooding under the Government's intermittent flowage easement made it less burdensome than the Power Company's easement to flood permanently[13] and, further, that there were benefits to the residue of the 7400-acre tract resulting from

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[10] U. S. App. 41-43, esp. 43, and Interrogatory 6 and answers thereto in Vepco App. 22 and 25-26. The statement on pages 3-4 of the petition that the Government had initially intended to condemn the fee but at the "urgent request of the fee owner" had agreed to acquire only a flowage easement, is partial and misleading. On the other hand, the Government accepted the underlying fee owner's offer to convey an easement subject to the outstanding interest of the Power Company "[i]n view of the very substantial savings involved" (Vepco App. 171, see also Vepco App. 151-152, 167-168, 169-183). In its first brief filed with the court of appeals, the Government explained that this practice was "not of recent origin" (p. 22) and it was ". . . the policy of the Government to condemn only the minimum interest which it needs to accomplish its purpose and leave to the landowner as much of his property as possible . . ." (September 1954, No. 6839, pages 25-26).

[11] Vepco App. 58-60.

[12] 218 F. 2d 524, 525; 270 F. 2d 707, 709.

[13] U. S. App. 61-62, 69; this point was argued vigorously in the Government's brief of September 1954 on pages 21, 24-25.

the Government's project, which would reduce the amount of compensation or damages.[14]

On remand from the court of appeals, the district court entered an order appointing commissioners to determine the compensation for the Government's flowage easement over 1840 acres of the 7400 acre tract[15] and gave them instructions.[16] The Government made only a general objection to the inquiries submitted by the Court to the commissioners and to the instructions, upon the ground that they were erroneous because they did not require the commissioners to determine the value of the Power Company's flowage easement.[17]

At the hearings before the commissioners the Government offered no evidence and did not claim there were any benefits to the residue. No objections were filed to the commissioners' report and it was confirmed by the district court. The commissioners stated in their report that the residue had been damaged "beyond any peculiar benefits that might accrue to such property from the acquisition of the easement by the United States and converting it to its uses," which benefits, if any, the district court's order required them to consider.[18] Excluding from their valuations any element of value arising from the availability of

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[14] U. S. App. 69; footnote 6 on pages 8-9 of the Government's Petition for Writ of Certiorari, No. 41, October Term 1955, Vepco App. 54-55; and 33 U. S. C. § 595, which is applicable here by reason of 33 U. S. C. §§ 591, 701c, U. S. App. 4, 10-11.

[15] App. 1-4; U. S. App. 106-110. The two exhibits attached to this order are printed in Vepco App. 61-66.

[16] App. 5-6; U. S. App. 111-112.

[17] U. S. App. 103-105, 113, 118-122, 123; cf. the second paragraph of footnote 3 on page 6 of the Government's petition. That was the same position the Government had taken in its petition for rehearing of August 30, 1956, which was rejected by the court of appeals, 237 F. 2d 165; U. S. App. 100a-100b.

[18] App. 1 at 4; U. S. App. 106 at 109 and App. 7 at 9; U. S. App. 124 at 126.

the land for water power purposes, the commissioners determined that $70,920 was the just compensation for the Government's flowage easement over 1840 acres of the 7400 acre tract.[19]

After hearing evidence, the district court overruled the Government's motion to exclude from "any award of just compensation to the defendants herein any element of compensation based on damages to the residue of the land involved," based upon the contention that the Government's option cont[illegible] with the fee owner had included a settlement for all the damages to the residue.[20] The district court held that when the Power Company acquired its flowage easement over 1540 acres of the 7400 acre tract, it paid for the resulting damages to the residue of that tract and, since the Government's easement over the same land caused damages to the residue, that the Power Company's share in the just compensation for the Government's easement should reflect such damages (App. 13-20 at 18; U. S. App. 179-188 at 186).

The district court then determined that the compensation to the Power Company for its easement to flood permanently 1540 acres of the 7400 acre tract, within the 1840 acres embraced by the Government's easement, should be $65,520 and entered judgment accordingly. That sum was equivalent to the compensation determined by the commissioners for the Government's easement upon the assumption that such easement involved only the 1540 acres covered by the Power Company's easement. This had been done under the second inquiry to the commissioners—which inquiry the

[19] App. 7 at 10; U. S. App. 124 at 127.

[20] U. S. App. 174-178. The evidence included the 1925 deed granting the flowage easement to the Power Company's predecessor, wherein the fee owner released all claims for damages to the residue of the Falkland Estate resulting from such flooding, see Government Exhibit C, U. S. App. 217-222, esp. 221.

district court held was "the appropriate measure of compensation."[21]

The Court of Appeals affirmed.

ARGUMENT

I.

No Question Presentable on This Record Merits Review

The Government's petition (page 3) correctly states that this was a proceeding to condemn a flowage easement "over the tract now involved", required for its use in the operation of the Kerr Dam Reservoir, in which:

> "The issue was how much compensation was owed for the imposition of that easement and to whom it should be paid."[22]

The petition then, at page 6, demonstrates that the procedure for determining the compensation owed for the imposition of the Government's easement was correctly followed:

> ". . . The *'res'* valued was the before-and-after value of the Falkland Estate * * * of some 7,400 acres rather than the respondent's claimed flowage easement involving only 1,540 acres. . . ."[23]

Thus, it appears on the face of the Government's petition

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[21] App. 19; U. S. App. 186.

[22] See also U. S. App. 174, 176-177.

[23] This was clearly proper for in the United States Army Corps of Engineers, *Real Property Appraisers' Handbook* (U. S. Government Printing Office, October, 1955), it is said (at page 34): "In valuing flowage easements, appraisals of the fair market values of two distinct estates are required; the entire land tract before imposition of the easement and the entire land tract after imposition of the easement. *The difference between the appraisals of the two estates represents the damages, or the value of the easement.*" This is the law of the land. *Olson* v. *United States*, 292 U. S. 246, 253, 255-257 (1934); *Karlson* v. *United States*, 82 F 2d 330, 337 (8th Cir. 1936).

that procedurally, at least, the case was decided in an unassailable fashion. No doubt it is for this reason that the Government's statement of the "Questions Presented" relate only to the allocation by the district court of what is admittedly the just compensation owed by the United States for the imposition of its easement.

By the same token, the varying arguments interspersed throughout the Government's petition concerning the valuation of the Power Company's interest relate only to the allocation between the condemnees of the just compensation owed. As the Government has maintained from the outset, all the rights it now has in the Falkland Estate *were obtained in this proceeding.*[24] The valuation of the Power Company's rights would have nothing to do with the just compensation owed for the rights acquired by the Government in this proceeding because the Government took *both more and less* than the Power Company's interest. Consequently, the valuation of the Power Company's interest was solely a matter of allocation of the award between condemnees and would not measure the just compensation for the Government's easement.[25]

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[24] See *supra*, pages 5-6; and footnotes 9 and 10 on those pages.

[25] The Government's argument that *only* the Power Company's easement should have been valued cannot be supported under its own pleadings and the uncontradicted facts. Nor has the Government advanced any reason for reviewing the holdings of the court below (1) that this was an *in rem* proceeding requiring just compensation to be fixed without regard to ownership of the property (235 F. 2d 327, 329; and 237 F. 2d 165, 166; in addition to the authorities cited by the court of appeals, see *United States* v. *25,936 Acres, etc.*, 153 F. 2d 277, 279 (3d Cir. 1946); *Eagle Lake Improvement Co.* v. *United States*, 160 F. 2d 182, 184 (5th Cir. 1947), *cert. den. sub nom. Humble Oil & Ref. Co.* v. *United States*, 332 U. S. 762 (1947); *Burkhart* v. *United States*, 227 F. 2d 659, 662, 663 (9th Cir. 1955); Annot., 166 A. L. R. 1211 (1947); 4 Nichols, *Eminent Domain* (3d ed. 1951) §12.3[1] p. 144; 2 Lewis, *Eminent Domain* (3d ed. 1909) §716, p. 1253, and (2) that this case did not involve the imposition of an additional or second easement, requiring a determination of the decrease in value of the use of the prior easement (237 F. 2d 165, 166).

Thus, the only possible question now in this case relates to the allocation of a part of the just compensation to the holder of an interest in the property upon which the Government has imposed its flowage easement. Under the well-settled doctrine that the condemnor is not concerned with the distribution of the award among the owners of interests and rights in the land[26] it is clear that the Government has not raised any substantial question warranting review by this Court.

Respondent, however, will show in this brief that none of the contentions in the Government's petition has merit.

II.

The Court Below Correctly Held That the Owner of a Valid and Existing Flowage Easement Over Riparian Land Was Entitled to Compensation Therefor.

The Government's petition does not directly address the question whether the owner of the right to flood riparian land is entitled to any compensation when the United States takes over or destroys that right. The petition, however, does this indirectly by various contentions to the effect that proper standards or principles were not followed in measuring the compensation for that flowage easement. By these arguments the Government attempts to force the conclusion that a private property right of this nature is not

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[26] *United States* v. *Dunnington*, 146 U. S. 338, 352-353 (1892); *City of St. Paul* v. *Certain Lands, etc.*, 48 F. 2d 805, 807 (8th Cir. 1931); *United States* v. *Certain Lands in the Borough of Brooklyn*, 129 F. 2d 577 (2d Cir. 1942); *United States* v. *19,573.59 Acres of Land in Cheyenne County, Nebraska*, 70 F. Supp. 610 (D. Neb. 1947), *aff'd sub nom. State of Nebraska* v. *United States*, 164 F. 2d 866 (8th Cir. 1947), *cert. den.* 334 U. S. 815 (1948); *United States* v. *Adamant Co.*, 197 F. 2d 1, 5 (9th Cir. 1952); 2 Nichols, *Eminent Domain* (3d ed. 1950), § 5.3[4], p. 51; and 4 Nichols, *op. cit.*, § 12.42[2], p. 172; Rule 71A(c)(2), Fed. R. Civ. P.; 3 Barron and Holtzoff, Federal Practice and Procedure, Rules Edition, § 1519, p. 554.

compensable in a taking by the United States. The Government's arguments, however, are based upon the hypothesis or "truism" (Pet. 7) that a private owner's right to flood riparian land has no value since the owner does not also have the right to *use* the waters of a navigable stream for power purposes. In other words, according to the Government, it is the owner's use or ability to use his property which gives the property value.

This is indeed a new and novel doctrine (for which the Government cites no authority) that has been rejected five times in so many words by the court below, in opinions representing the considered judgment of six judges. This was done at least three times in the instant case[27] and twice more in that court's consideration of the Government's same contention in *United States* v. *Twin City Power Company*, 248 F. 2d 108, 113; *rehearing den.* 248 F. 2d 114, 115 (1957), *cert. den.*, 356 U. S. 918 (1958). In the opinion which this Court declined to review, the Court of Appeals held that the Government's contention violated elementary principles of valuation (248 F. 2d 114 at 115).

The right to overflow land is not a water privilege. The Government has a paramount navigation servitude over the subaqueous land of a navigable stream and the paramount right to the use of the flow of the water of such stream, but it does not follow in logic or in common sense that this paramount servitude in the flow of the stream includes the right to overflow fast land riparian to a navigable stream. This being true, it follows that when that is done, the Government must pay just compensation therefor to the owners of interests or estates in such land. When such compensation is fairly determined, the distribution of the award is, to put it bluntly, none of the Government's busi-

[27] 235 F. 2d 327, 329; 237 F. 2d 165, 166; and 270 F. 2d 707, 710-711.

ness. The only valid exception is where the Government has made settlement with the owner of an interest in the land, in which event the Government should receive credit for the portion of the award which would otherwise be paid to that owner. This was done in the instant case and the Government has been guilty of overreaching in its varying attempts at different stages of this litigation, over a period of more than seven years, to obtain more consideration than it lawfully deserved and to defeat payment of a portion of the just compensation to the Power Company to the extent of the value of its property interest in the 7400 acre Falkland Estate.

III.

There Is No Reason for This Court's Review of the Decision Approving the District Court's Holding That the Owner of a Flowage Easement Was Entitled to Share in the Just Compensation for the Government's Flowage Easement to the Extent of the Value of the Owner's Interest in the Land Involved.

It has heretofore been shown that the Government cannot now argue that the just compensation for the Government's flowage easement amounting to $70,920 was not correctly determined and that the only remaining question concerns the allocation of the award of just compensation among the respective owners of interests or estates in the land involved. Only two of the parties had claims, the owner of the underlying fee and the Power Company to which the fee owner had, for a valuable consideration, conveyed the right to flood permanently most of the same land. The owner of the underlying fee having agreed with the Government for valuable considerations, to accept $1.00 for her share in the award, the amount of the compensation properly attributable to the

interest of the owner of the underlying fee ($5400) was reduced to $1.00 and the Government has been required to pay the Power Company only the share of the compensation that is attributable to the value of its flowage easement over the same land. The allocation or apportionment of the award between the several owners of property interests in the land depends upon the nature, extent and value of their interests. The procedure for allocating the compensation award between the owner of the underlying fee and the owner of the flowage easement, which was followed in the instant case, was clearly spelled out in *United States* v. *Twin City Power Co.*, 248 F. 2d 108 at 114 and in the opinion denying rehearing, 248 F. 2d 114 at 115, *cert. den.*, 356 U. S. 918 (1958).

In this case, the owner of the underlying fee recognized, that the Power Company's flowage easement had value (1) in the option contract with the Government, and (2) by making no claim to any portion of the award of just compensation other than the amount agreed upon in the option contract. In making the agreement with the owner of the underlying fee, the Government also recognized that the Power Company's rights had value (see Vepco App. 167, at 169-172 and 177-179).[28]

The Government's petition contends that the Power Company's easement diminished the fee value "only to the extent that there was a reasonable probability of its exercise" (Pet. 12) and that it had only a nominal or nuisance value as a cloud on the title (Pet. 11, fn. 5) but the Government has *never* offered evidence supporting these contentions. The

[28] Defendant's Exhibit 1, Vepco App. 182 at 183 (introduced at Vepco App. 145) reads in part as follows: "Colonel Frech also reports that representatives of the Estate are agreeable to conveying, in lieu of fee title, a comprehensive flowage easement to the Government for a nominal consideration, *subject to rights now held by the Virginia Electric Power Company. The rights of the Virginia Electric Power Company will be the subject of separate negotiations.*"

Government also errs in claiming that there was no evidence whatever indicating that the Power Company's flowage easement had value as such on the date of the taking (Pet. 11, fn. 5) for that was established at the outset by the uncontradicted testimony of the Respondent's witness Blackburn, to the complete satisfaction of the district court (U. S. App. 47-57, esp. 56-57).[29]

When the matter of how the just compensation "should be distributed between the fee owner and the Power Company came before the district court for decision,[30] the Government's position was that the Power Company was not entitled to anything and, in any event, not to any of the damage to the residue because it had "no interest in or ownership of any part of the 'residue' ".[31]

After hearing evidence and argument the district court overruled the Government's motion.[32] It should be noted that the Government did not even mention that no compensation should be paid to the Power Company because it had no right to use the land for agricultural, grazing or forestry purposes (U. S. App. 188-189; Vepco App. 179-183).

A.

THE POWER COMPANY WAS NOT PAID FOR THE RIGHT TO USE THE LAND FOR AGRICULTURAL OR FORESTRY PURPOSES.

The Government's assertion that the Power Company received the value of the land for agricultural, grazing or forestry purposes on the theory that it had the right to so

[29] The Government admitted this on pages 9-11 and 29-30 of its first brief filed with the Court of Appeals (September 1954, No. 6839).

[30] See Government's Offer of Proof, U. S. App. 176.

[31] U. S. App. 174-175.

[32] App. 13 at 19; U. S. App. 179 at 186.

use the land (Pet. 2 and 7-8) is unfounded. The Government did not advance this argument in the district court.

Defendant's witnesses, who were uncontradicted and testified without objection, stated that the highest and best use of the land was for agricultural, grazing or forestry purposes and they estimated *fee* values accordingly. These witnesses did not give the same fee values and they differed with respect to the amount and extent of the *depreciation* of the fee values because of the imposition of the Government's intermittent flowage easement. The commissioners disagreed, for their determinations were substantially less than the estimates by the valuation witnesses (270 F. 2d 707, 711). There is, therefore, no basis for the Government's claim that the commissioners' determinations, to which the Government did not object and which were confirmed by the district court, represented the entire value of the property for agricultural, grazing or forestry purposes. The commissioners determined only the *difference* in the value of the land before ($596,000) and after ($525,080) the imposition of the Government's easement.[33] Clearly there was a substantial "residual value" left in some of the land subject to the Government's easement. Finally, the district court, upon the evidence before it, determined that only a *portion* of the compensation for the Government's easement should be paid to the Power Company for its right to flood permanently a part of the land taken by the Government.

This same argument has been rejected sharply, the Court of Appeals saying ". . . the fact is that we made no such

[33] App. 10; U. S. App. 127. The same applies to the commissioners' findings with respect to the second inquiry where they found a "before" value of $596,000 and an "after" value of $530,580 (App. 11; U. S. App. 128). The awards in the first and second trials of this case are in no wise comparable, see cross-examination of the Power Company's appraisers, U. S. App. 35-40.

holding then and we make none now." (270 F. 2d 707 at 712).

It is submitted that the clear statement by the court below should foreclose any further argument.

B.

THE POWER COMPANY WAS NOT COMPENSATED IN EXCESS OF THE VALUE OF ITS FLOWAGE EASEMENT UPON THE FALKLAND ESTATE.

The Government's claim that the Power Company was paid "severance damages" to which it was not entitled (Pet. 3 and 13-15) cannot be sustained. There is no reference to "severance damages" in the inquiries submitted to the commissioners, their instructions, the evidence, the commissioners' report or in the district court's judgment order. On the other hand, the commissioners' report stated, pursuant to the Government's request,[34] that the $65,500 difference in the value of the land with and without the servitude of the Government's intermittent flowage easement, assuming that its easement was limited to the 1540 acres subject to the Power Company's easement to flood permanently, included "damages to the residue" amounting to $11,720.

This Court has pointed out that the term "severance damages" does not convey its dictionary meaning and is a loose term used in a subsidiary rule for ascertaining just compensation.[35] The process of determining values before and after the imposition of an easement includes all considerations, such as damages to the residue and benefits.[36] There is no authority holding, as the Government contends (Pet.

[34] App. 7 at 10-11; U. S. App. 128.

[35] *United States* v. *Miller*, 317 U. S. 369, 375-376 (1943).

[36] 4 Nichols, Eminent Domain (3d ed. 1951) §§ 14.232 and 14.232[1] at 332-337.

13-15), that damages to the residue can be awarded *only* where the taking is in fee.[37]

The question whether there was a lack of unity of ownership or use with respect to the portion taken and the portion remaining was a matter for decision in the district court, *United States* v. *Mills*, 237 F. 2d 401, 404-405 (8th Cir. 1956); Annot., 6 A. L. R. 2d 1197 at 1207 (1949). None of the cases cited in the Government's petition, page 14, involves situations similar to the instant case and are not applicable.

Evidence of the damages to the residue "proved the existence and the amount and was uncontradicted" (270 F. 2d 707, 713). The district court held that the value of the Power Company's interest should be measured by its extent, which included damages to the residue, and that the Power Company should share accordingly in the compensation for the Government's easement. The court below approved that *measure* of value (270 F. 2d 707, 713-714).

Thus, there is no substantial basis for the Government's contentions that this case should be reviewed by this Court because the court below "fail[ed] to appreciate the scope of the principle under which different titles vested in different

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[37] See *United States* v. *Dickinson*, 152 F. 2d 865, 869-870 (4th Cir. 1946), *aff'd* 331 U. S. 745, 750-751 (1947), a proceeding under the Tucker Act for compensation for the "taking" of a flowage easement; see *United States* v. *Grizzard*, 219 U. S. 180 (1911); *Karlson* v. *United States*, 82 F. 2d 330, 337 (8th Cir. 1936); and *Slattery* v. *United States*, 231 F. 2d 37 (5th Cir. 1956).

The case of *United States* v. *Honolulu Plantation Co.*, 182 F. 2d 172 (9th Cir. 1950), *cert. den.* 340 U. S. 820 (1951) does not hold, as the Government suggests (Pet. 13-14), that severance damages can be recovered *only* where there is condemnation of the "fee simple title of a tract." That statement is dictum, unsupported by authority, and is contrary to all decisions by this and other courts involving the condemnation or taking of flowage easements. The Government's contention is also contrary to official instructions to Government appraisers, see *supra*, page 9, footnote 23.

persons have repeatedly been held inadequate support for an award of severance damages" (Pet. 14), or for the reason that "any 'severance damage' to *flowage easements* (sic) over land not embraced in the Government's condemnation would have to be based on some theory of *interference* with or *frustration* of a right to development of water power. . . ." (Pet. 15).

C.

THE GOVERNMENT'S ANALOGY TO PROCEEDINGS UNDER THE TUCKER ACT DOES NOT SUSTAIN ITS POSITION

The Government's arguments based upon an analogy to cases under the Tucker Act (Pet. 9, 10-11) are improper because they are erroneously based upon the premise that the instant condemnation suit involved *only* the value of the Power Company's flowage easement and that a procedure different from that followed in eminent-domain proceedings would be applied, i.e. frustration of use. But this case cannot be so regarded because it is an *in rem* proceeding against the land, wherein the owner of the underlying fee and other "unknown owners" of interests or estates in the property are parties and the issues were the amount of just compensation for the rights taken by the *Government* (not the Power Company's) *and* the allocation of such compensation to the holders of interests in the property taken or damaged. There was no conveyance to the Government by the owner of the underlying fee and the rights of the underlying fee owner were involved in this proceeding. Had this matter been left to resolution under the Tucker Act, the determination of the just compensation for the property damaged by the Government's unauthorized flooding, and the allocation of such compensation to the owners of interests therein would follow the same procedure as was followed in the instant case. In

both instances the valuations are made on the basis of the before and after values of the land involved, as of the time of the "taking," or of the Government's entry upon the land, including all past, present and prospective damages—both to the land "taken" and to the residue.[38]

Therefore, it is clear that the Power Company would be entitled to receive the same compensation in a proceeding under the Tucker Act as was determined in the instant condemnation case and that the Government's "frustration of use" doctrine, which it now advances for the first time in this protracted litigation, would not be applicable.

D.

THE GOVERNMENT'S "SETTLEMENT" WITH THE OWNER OF THE UNDERLYING FEE HAS NOT PREJUDICED ITS POSITION.

The Government has assumed inconsistent positions with respect to its "settlement" with the fee owner. The Government contends that the court below has given "great importance to a completely irrelevant factor, *i.e.* the rights of the fee owner" (Pet. 8) and later asserts that "the fact that the Government has *settled* with one of several condemnees is not to be ignored, nor does it enlarge the rights of others or entitle them to compensation for more than the legal interest they themselves have in the property" (Pet. 10).

[38] *United States* v. *Dickinson*, 152 F. 2d 865 (4th Cir. 1946), *aff'd* 331 U. S. 745 (1947) and the authorities discussed in both opinions. See also, *United States* v. *Dow*, 357 U. S. 17 (1958), which is referred to on pages 9 and 16 of the Government's petition; *Hurley* v. *Kincaid*, 285 U. S. 95, 104 (1932), cited on page 9 of the Government's petition. The Government's liability is neither more nor less in either case. In *Jacobs* v. *United States*, 290 U. S. 13 (1933), where there was an award under the Tucker Act, this Court said (at p. 16): ". . . The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim."

Subsequently, the Government says that it is "legally immaterial" that "the United States, under the rule we advocate, would be getting something for nothing" (Pet. 12). Finally, the Government contends that, relying upon the authority of the decisions of the Court of Appeals in the instant case, "the public has been required to pay twice for the same property values" (Pet. 15).

The Government is responsible for injecting this matter into the case. The record shows that the Government's "settlement" with the owner of the underlying fee has not enlarged the rights of anyone or resulted in a payment of compensation to anyone of more than the fair market value of their interest in the property. In this case the Government has *not* been *"required* to pay twice for the same property", only once.[39]

Considerations of justice and constitutional right do not permit any court to overlook as immaterial the fact that the Government would be getting something for nothing (270 F. 2d 707, 709) under the unprecedented theories it has advanced at various stages of this litigation. As Chief Judge Parker said (235 F. 2d 327, 330):

> "... *there is no reason in law, in equity, in good conscience or in common honesty* why the compensation to which [the underlying fee owner] would otherwise

[39] As a matter of fact, the Government has been required to pay substantially less than what is the just compensation for its flowage easement. As far as counsel for Respondent can ascertain, the Government has *not* been *required* to pay compensation twice for the same property values in *Augusta Power Co.* v. *United States* (and reverse title No. 150) now awaiting decision in the Fifth Circuit. Nor can this claim be sustained with respect to the compensation which the Government paid voluntarily to the owners of the underlying fee in *United States* v. *Twin City Power Company*, 248 F. 2d 108, 114-115 (4th Cir. 1957), *cert. den.* 356 U. S. 918 (1958). The "flowage acres" involved in both of these cases aggregate 554.77 acres.

> have been entitled should not be paid to the one to whom such rights have been conveyed. . . ."

And as Judge Soper said later (270 F. 2d 707, 712):

> ". . . The Government was justified in giving nothing to Mrs. Williams for the right to flood this additional area because of her agreement; but we find *no justification* for the contention that the Government should not pay the Power Company for the interest which it had acquired in the Falkland tract."

It is submitted, therefore, that the foregoing contentions by the Government afford no substantial basis for review by this Court.

IV.

There Is No Conflict of Decision

This Court did not hold, as the Government's petition implies (Pet. 7, 8, 9 and 15), that no compensation could be awarded for flowage easements in *United States* v. *Twin City Power Company*, 350 U. S. 222 (1956), or in vacating the first judgment in this case and remanding it for further consideration in the light of its decision in the *Twin City* case.

On the other hand, this Court's holding in the *Twin City* case was that in the valuation of fast land adjacent to a navigable stream the valuation of such land for its highest and best use could not include the land's adaptability for water power purposes.

The Government now wishes to expand that doctrine to include other elements of value not related to the flow of the stream. This is shown by the Government's failure to discuss the clear distinction between the *Twin City* decision and this

case which was drawn by Chief Judge Parker in the Court of Appeals' second opinion in the instant case (235 F. 2d 327, 329).

Subsequent actions by the court below and by this Court, in the continuation of the litigation in the *Twin City* case, have made this distinction crystal clear. For upon the remand of the *Twin City* case, *supra*, the district court held that compensation for the taking of certain flowage easements over approximately 156 acres should be denied if power site value were not included. But the Court of Appeals reversed that ruling by the district court and remanded the cause for further proceedings to place a value on the flowage easements (248 F. 2d 108, 4th Cir. 1957), the Government's petition for a rehearing on this point was denied (248 F. 2d 113, 114, 4th Cir. 1957). Whereupon, the Government applied to this Court for certiorari and one of the "Questions Presented" on page 2 of its petition (No. 785, October Term, 1957) was:

> "3. Whether the United States may be required to pay agricultural or timber value for the destruction of a flowage easement."

All of the Government's contentions and claims in that petition with respect to the question of the value to be accorded flowage easements (*ibid.*, pp. 14-18 and on pages 7-10 of the Reply Memorandum of March 1958) are repeated almost verbatim in its present petition.

The Government now seeks to minimize this Court's denial of certiorari in the *Twin City* case, *supra*, (356 U. S. 918). While we know such denial indicates nothing with respect to the merits of that case, it is respectfully submitted that if the third question in the Government's petition in the *Twin City* case (which is substantially the same as the Government's second question presented in the instant case)

had been so clear, so important, or the decision of the Court of Appeals so erroneous, or the matter so fundamental to the further conduct of that case, as the Government then contended, the fact that "the judgment as to the flowage easement question was not final" is not so important a distinction as the Government now makes (Pet. 16). Furthermore, what the Government has overlooked completely is that there would have been no point in this Court's remand of the instant case for further consideration in the light of *United States* v. *Twin City Power Co.*, 350 U. S. 222 (1956), if flowage easements were not compensable under that decision.

It would seem, therefore, that Judge Soper, the only circuit judge who has participated in all of these flowage easement cases in the Fourth Circuit, was right when he said (270 F. 2d 707, 710-711):

> "It seems plain to us that the flowage easement of the Power Company had substantial market value in its hands in spite of the fact that the availability of land as a potential power site is not an element of value to be considered in the condemnation by the United States of a riparian owner's rights. Although it is true that the Power Company could not use the waters of the stream for power purposes except with the approval of the United States, it is equally true that neither the United States nor anyone else could use the land in connection with the stream as a power site so long as the Power Company possessed the flowage easement acquired from the owner of the fee . . . Obviously, anyone who desired to acquire the rights would expect to pay for them, and their value, whether in the hands of the owner of the fee or of her grantee, would be what they would bring in the open market."

Instead of being new or novel, this question is by now a very tired issue.

The Government has not cited any decision by this Court or by any court of appeals which conflicts with the holdings by the Court of Appeals in the last three decisions in this case.

CONCLUSION

For the foregoing reasons it is submitted that none of the four grounds urged for granting the writ are valid and the petition should be denied.

Respectfully submitted,

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April 1, 1960

APPENDIX

ORDER APPOINTING COMMISSIONERS
(U. S. App. 106-110)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, CONTINUED AND HELD AT ROANOKE ON THE 1ST DAY OF MAY, 1958

Civil No. 296

UNITED STATES OF AMERICA, PLAINTIFF,

v.

2979.72 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF HALIFAX, VIRGINIA, OLIVE VAUGHAN WILLIAMS, ET AL., AND UNKNOWN OWNERS, DEFENDANTS

ORDER APPOINTING COMMISSIONERS

ON MOTION OF THE DEFENDANT, Virginia Electric and Power Company, for the appointment of commissioners to determine the just compensation to be paid to said defendant for the acquisition by condemnation by the United States of America of an easement over the tract of land designated and described in this proceeding as Tract No. EF-3100E, a description of which tract is hereto attached marked Exhibit A,

IT APPEARING TO THE COURT that notice of condemnation has been duly served, as required by Rule 71A of the Rules of Civil Procedure, upon all persons having or claiming any interest in said tract, and that the plaintiff has demanded a jury trial on the issue of just compensation, and

IT FURTHER APPEARING TO THE COURT

(1) That the lands in question are located approximately sixty miles from Danville, Virginia, the nearest city in which Federal Court sits;

(2) That upon the trial of this case the defendant intends to offer the oral testimony of residents of the area in which these lands lie, and that it would be inconvenient, expensive and burdensome for such witnesses to travel to Danville to give their testimony in this case;

(3) That it will not be feasible for the issues in this case to be determined by a jury because of the distance involved, with the difficulty and expense of transporting the jury from Danville to the lands in question, and return;

(4) That because of the character, location and quantity of the property and the unusual nature of the inquiries to be made herein, this proceeding can be materially facilitated by reference to a commission;

(5) That the hearings can be considerably shortened by reference to a commission rather than a jury;

(6) That the issues of compensation can be better determined by a commission than by a jury in the circumstances presented by this case; and

IT APPEARING and the Court now finding that due to the character and location of the property taken, and for the other reasons above recited, it is in the interest of justice that the issue of just compensation in this matter be tried by commissioners pursuant to said Rule 71A,

NOW, THEREFORE, plaintiff's motion for trial by jury is hereby denied, to which ruling of the Court plaintiff excepts, and the Court hereby appoints Robert S. Weaver, Victoria, Virginia, J. T. Thompson, Keysville, Virginia, and James B. Wilborn, South Boston, Virginia, three disinterested freeholders, as commissioners, and with the consent of all counsel, the United States consenting without waiving its demand for trial by jury and its exception to the Court's denial of said demand, the Court hereby appoints Wirt Shapard, Halifax, Virginia, as alternate commissioner to

serve in the event of inability of one of the regular commissioners to act.

Pursuant to said Rule 71A, the commission shall have the powers of a master provided in Rule 53 of the Federal Rules of Civil Procedure, including the power to regulate the proceedings, rule on questions of evidence and to do all acts and take all measures necessary or proper for the efficient performance of its duties under this order.

The duty of the Commissioners shall be to ascertain and report on each of the following inquiries:

> FIRST: What is the difference between the fair market value of the Falkland Tract, consisting of 7,400 acres, with and without the servitude of the Government's easement, as described in Exhibit B hereto attached, over the land in Tract FF-3100E up to contour 330, involving 1840 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?
>
> SECOND: What is the difference between the fair market value of the Falkland Tract, consisting of 7400 acres, with and without the servitude of the Government's easement, as described in Exhibit B hereto attached, assuming for the purpose of this inquiry that said easement is over the land in Tract FF-3100E up to contour 321 only, involving 1540 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?
>
> * * * *
>
> [NOTE: The omitted Third and Fourth Inquiries may be found in U. S. App. 108-109.]

In making the First, Second and Fourth inquiries, the commissioners shall include only such damage, if any, to the residue which are over and above the benefits, if any, peculiar to the residue in each instance, resulting directly from the taking and proposed use to be made by the Government of the land taken herein.

IT IS FURTHER ORDERED that said commissioners meet at 10:00 o'clock A.M. on the 2nd day of June, 1958, at the Halifax County Court House, in Halifax, Virginia, to be sworn and instructed as to their duties as such. The commissioners shall be sworn by the Clerk, or Deputy Clerk of the Circuit Court of Halifax County, Virginia, or by a Notary Public. Thereafter, the Commissioners will, as soon as may be, proceed to view the above described tract of land and proceed to execute their duties as to the ascertainment of the just compensation for the condemnation thereof. The Court hereby sets the fees of said commissioners at the sum of $25.00 per day and expenses.

IT IS FURTHER ORDERED that the Clerk of this Court forthwith transmit to the United States Marshal for the Western District of Virginia five certified copies of this order and that said Marshal will, as soon as may be, with due diligence, serve a copy of this order on each of the above-named commissioners and the alternate commissioner, and that the Marshal will thereafter make the return to the Clerk's Office of this Court, at Roanoke, showing how and when he has executed this order.

/s/ JOHN PAUL,
District Judge.

A true copy, Teste:

CLARENCE E. GENTRY,
Clerk.

By GRACE A. HARPER,
Deputy Clerk.

INSTRUCTIONS TO COMMISSIONERS

(U. S. App. 111-112)

Civil No. 296

UNITED STATES OF AMERICA, PLAINTIFF

v.

2979.72 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF HALIFAX, VIRGINIA, OLIVE VAUGHAN WILLIAMS, ET AL., AND UNKNOWN OWNERS, DEFENDANTS

INSTRUCTIONS TO COMMISSIONERS

The Court instructs the Commissioners that in performing your duties you should go upon the land, examine it, hear testimony and consider such testimony along with your personal observation in arriving at your conclusions.

Fair market value is the price which an informed and intelligent purchaser, who desires to buy but is not compelled to buy, would be willing to pay, and the price which an informed and intelligent owner, who desires to sell but is not compelled to sell, would be willing to accept for the property.

In determining the fair market value the property should be evaluated on the basis of the highest and best use (i.e. the most profitable and advantageous use) to which it is reasonably adapted at the time of taking or might be adapted in the reasonably foreseeable future, even though the property was not being so used at the time it was taken.

While you must abstain from any speculative or conjectural ascertainments both in the use of the property and in its fair market value, it is proper that the use of the property be measured in respect not only to the time of the taking but to the reasonably foreseeable future.

You must exclude, however, from all your valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream.

Inasmuch as the landowner, with the consent of the Government, has sold all of the growing timber on Tract FF3100E, and the same has already been cut, you should not include the value of such timber in making your determination of the inquiries set forth in the order appointing you commissioners.

In making your determination of fair market value, you should disregard the fact that Virginia Electric and Power Company has a perpetual flowage easement over some of the land involved in this case and that the owner of the fee, Olive Vaughan Williams, and the United States made an option contract dated April 30, 1951, and you are further instructed that you should not attempt to determine the value of the respective interests of the owner of the fee or of such flowage easement.

JOHN PAUL,
District Judge.

REPORT OF COMMISSIONERS
(U. S. App. 124-130)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT ROANOKE

UNITED STATES OF AMERICA, PLAINTIFF,

2,979.72 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF HALIFAX, VIRGINIA, OLIVE VAUGHAN WILLIAMS, ET AL., AND UNKNOWN OWNERS, DEFENDANTS

Civil No. 296

Tract No. FF-3100E

REPORT OF COMMISSIONERS

To: The Honorable John Paul, United States District Judge For The Western District of Virginia:

The undersigned, constituting the commission appointed by the Court in the above entitled proceeding, pursuant to Rule 71A and Rule 53 of the Federal Rules of Civil Procedure by order dated May 1, 1958, to which order reference is hereby made, respectfully submit the following report:

1. Pursuant to the aforesaid order, we met at 10:00 a.m. on the 2nd day of June, 1958, at the Halifax County Court House in Halifax, Virginia, and were sworn by the Deputy Clerk of the Circuit Court of Halifax County, Virginia, a copy of which oath is attached to this report marked Exhibit A. After reviewing together the aforesaid order and the Court's instructions to the commissioners dated May 1, 1958, which had been handed to each commissioner

along with the aforesaid order by the United States Marshal serving said order, we met together on the tract of land identified herein as Tract FF-3100E, consisting of approximately 1840 acres of land, and viewed the same, as well as the adjacent or remaining property of the Falkland Tract, consisting of an additional 5560 acres (approximately), and adjourned the proceedings until 10:00 a.m. on the 3rd day of June, 1958, at Halifax County Court House, Halifax, Virginia, for the purpose of hearing evidence as to values to be adduced by any of the parties interested in the proceeding.

2. On the 3rd day of June, 1958, at 10:00 a.m. we met together at the Halifax County Court House, Halifax, Virginia, for the purpose of hearing evidence. At that time and place, evidence was offered only on behalf of the defendants, their witnesses being T. W. Clark and R. M. Felton, Sr., two appraisers, who were qualified before the Commission, who based their findings on their knowledge of land values in the general area; and E. L. Munger, a trained and experienced forester and landowner, who had managed the operations on the Falkland Tract during the past 8 years. The Government did not offer any witness as to value, or as to any other matter, and stated that the Government did not wish to do so as its theory of the case was that, excluding power value, the government's easement was worth only a nominal sum. This hearing was transcribed by a qualified court reporter who has been directed by the commission to file with the Court the original transcript of all the testimony and other incidents at the hearing, together with all exhibits filed or offered at that time, and such transcript and exhibits are requested to be considered by the Court as a part of this report. Arguments were made before the commission in the afternoon of June 3, 1958, and the matter

then submitted to the commission by counsel for the Government and the defendant, whereupon the commission adjourned until 11 o'clock a.m. on June 9, 1958, for further consideration of the matter and for the formulation of its report.

In view of the foregoing, your commission considers it unnecessary to summarize the testimony of any of the witnesses, to comment upon the evidence or to state the basis upon which the witnesses arrived at their opinions of the fair market value or damages except to say that none of the witnesses included in their valuations any element of value arising from the availability of the land for water power purposes. In making its valuations the commission has excluded any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream and has considered the testimony along with their personal observations.

The government did not claim that there were any benefits resulting to the adjacent or remaining property, under the First, Second and Fourth Inquiries, because of the taking and proposed use to be made by the government of the easement taken herein. The evidence showed and, based upon such evidence along with our personal observation, the commission concludes that the adjacent or remaining property, under the First, Second and Fourth Inquiries, has been damaged beyond any peculiar benefits that might accrue to such property from the acquisition of the easement by the United States and converting it to its uses as set out in Exhibit B attached to the aforesaid order appointing commissioners dated May 1, 1958.

3. In arriving at its conclusions as to value and damages, the commission has followed the Court's directions in the order appointing commissioners and the Court's instruc-

tions to commissioners (the reference in such instructions to timber on Tract FF-3100E which had been cut was amended slightly by stipulation of counsel to conform to certain facts about which there was no controversy).

4. Accordingly, the commission ascertains and reports the following answers to the four inquiries by the Court:

I

"FIRST: What is the difference between the fair market value of the Falkland Tract, consisting of 7400 acres, with and without the servitude of the Government's easement, as described in Exhibit B hereto attached, over the land in Tract FF-3100E up to contour 330, involving 1840* acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?"

Answer: $70,920.00.

In accordance with the directions and instructions of the Court, the commission is of the opinion and does ascertain that in the circumstances involved in the First Inquiry, the fair market value of the Falkland Tract before the taking on October 23, 1952, was $596,000.00 and its value on said date after the taking was $525,080.00; accordingly the sum of $70,920 will be the just compensation, including all damages to the owner or owners of the adjacent or remaining property by reason of the acquisition of the aforesaid easement by the United States and converting it to its uses, as aforesaid, beyond the peculiar benefits that will accrue to such land from said acquisition and use by the United States.

* Misquoted, U. S. App. 127.

At the request of the Government that we should set forth in our report what portion of the just compensation represents damages to the residue (to which request defendant's counsel stated it would not object), we report that in our judgment such damages amount to $11,120.00.

II

"SECOND: What is the difference between the fair market value of the Falkland Tract, consisting of 7400 acres, with and without the servitude of the government's easement, as described in Exhibit B hereto attached, assuming for the purpose of this inquiry that said easement is over the land in Tract FF-3100E up to contour 321 only, involving 1540 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?"

Answer: $65,520.00.

In accordance with the directions and instructions of the Court, the commission is of the opinion and does ascertain that in the circumstances involved in the Second Inquiry, the fair market value of the Falkland Tract before the taking on October 23, 1952, was $596,000.00 and its value on said date after the taking was $530,580.00, accordingly the sum of $65,520.00 will be the just compensation, including all damages to the owner or owners of the adjacent or remaining property by reason of the acquisition of the aforesaid easement by the United States and converting it to its uses, as aforesaid, beyond the peculiar benefits that will accrue to such land from said acquisition and use by the United States. At the request of the government that we

should set forth in our report what portion of the just compensation represents damages to the residue (to which request defendant's counsel stated they would not object), we report that in our judgment such damages amount to $11,720.00.

* * *

[NOTE: The commission's answers and findings with respect to the Third and Fourth Inquiries may be found in U. S. App. 129-130.]

Alternate commissioner Wirt Shapard participated in all proceedings of the commission except in the making of these findings and report.

Given under our hands this 9th day of June, 1958.

Respectfully submitted,

ROBERT S. WEAVER,
Chairman.

J. T. THOMPSON,
JAMES B. WILBORN.

JUDGMENT AND ORDER FOR FINAL DISTRIBUTION BY THE DISTRICT COURT

(U. S. App. 179-188)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA AT LYNCHBURG

Civil No. 296

UNITED STATES OF AMERICA, PLAINTIFF,

v.

2979.72 ACRES OF LAND, MORE OR LESS, IN HALIFAX COUNTY, VIRGINIA, OLIVE VAUGHAN WILLIAMS, ET AL, AND UNKNOWN OWNERS, DEFENDANTS

JUDGMENT AND ORDER FOR FINAL DISTRIBUTION

This matter comes before the Court on motions of the Defendant, Virginia Electric and Power Company, to confirm and adopt the report of the Commissions herein and to award compensation to the said Defendant and upon the motion of the United States of America, by Leigh B. Hanes, Jr., Assistant United States Attorney, to Exclude Damages to Residue.

It appearing to the Court:

(1). That the Declaration of Taking was filed herein on October 23, 1952.

(2). That from the said Declaration of Taking, the papers filed in this proceeding on behalf of the aforesaid parties, including the stipulation dated January 18, 1954, and the evidence heard in open court on the 18th day of January, 1954, that Virginia Electric and Power Company on October 23, 1952, held a perpetual easement to flood

permanently 1,540 acres of the land described herein as Tract No. FF-3100E, parcels A to F.

(3). That by consent of the parties the Court on January 18, 1954, heard evidence and tried the issue of just compensation, and did thereafter enter its final judgment upon such issue on January 18, 1954, awarding to the said Virginia Electric and Power Company just compensation for the taking of the power company's easement the sum of Sixty-one Thousand Six Hundred Dollars ($61,600.00) exclusive of interest.

(4). That thereafter the United States of America appealed the judgment and final order aforesaid to the United States Court of Appeals for the Fourth Circuit which Court by decision appearing in 218 F. 2d 524 dated January 5, 1955, affirmed the said judgment and final order aforesaid.

(5). That thereafter the United States of America petitioned the Supreme Court of the United States for writ of certiorari to the United States Court of Appeals for the Fourth Circuit; whereupon the Supreme Court of the United States granted the same, vacated the judgment and remanded the case to the said Court of Appeals for further consideration in the light of the decision in *United States* v. *Twin City Power Co.*, 350 U.S. 222, 350 U.S. 956, January 30, 1956.

(6). That thereafter, the United States Court of Appeals for the Fourth Circuit issued its decision, 235 F. 2. 327, on July 31, 1956, vacating the judgment and remanding the case to this Court with directions to award to the power company as compensation for the taking of the easement condemned by the government the difference between the value of the land with and without the servitude of the easement, excluding from the valuation in both instances any

element of value arising from the availability of the land for water power purposes due to its being situate on a navigable stream.

(7). That thereafter, the United States of America petitioned the United States Court of Appeals for the Fourth Circuit for rehearing which that Court denied on September 11, 1956, 237 F. 2d 165.

(8). That thereafter this matter was returned to this Court by mandate of United States Court of Appeals for the Fourth Circuit with directions to proceed in accordance with the decisions of that Court, whereupon on September 24, 1956, this Court entered its order that further appropriate proceedings herein be had to award to Virginia Electric and Power Company compensation in conformity to the provisions of the aforesaid judgment of said appellate Court.

(9). That the Court overruled the motion of the United States of America for a trial by jury, to which the United States of America excepted, and upon motion of the said Virginia Electric and Power Company, the Court appointed three disinterested freeholders, agreed upon by the parties, as commissioners to determine the following inquiries:

> FIRST: What is the difference between the fair market value of the Falkland Tract, consisting of 7400 acres, with and without the servitude of the Government's easement, as described in Exhibit B hereto attached, over the land in Tract FF-3100E up to contour 330, involving 1840 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?
>
> SECOND: What is the difference between the fair mar-

ket value of the Falkland Tract, consisting of 7400 acres, with and without the servitude of the Government's easement, as described in Exhibit B hereto attached, assuming for the purpose of this inquiry that said easement is over the land in Tract FF-3100E up to contour 321 only, involving 1540 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?

* * *

[NOTE: The recital of the Third and Fourth Inquiries submitted to the commission may be found in U. S. App. 182.]

(10). That the said commissioners met at Halifax Courthouse, Virginia, on June 2, 1958, June 3, 1958, and June 9, 1958; viewed the said Tract FF-3100E and the "Falkland Estate" of which the said tract is a part, heard the testimony of witnesses, of Virginia Electric and Power Company, the United States of America having declined to produce any evidence of value, received exhibits and heard argument of counsel.

(11). That the said commissioners filed their report dated June 9, 1958 in this cause on June 19, 1958, answering the inquiries aforesaid as follows:

I. Answer: $70,920.00.

In accordance with the directions and instructions of the Court, the commission is of the opinion and does ascertain that in the circumstances involved in the First Inquiry, the fair market value of the Falkland Tract before the taking on October 23, 1952, was $596,000.00 and its value on said date after the taking was $525,-

080.00; accordingly the sum of $70,920 will be the just compensation, including all damages to the owner or owners of the adjacent or remaining property by reason of the acquisition of the aforesaid easement by the United States and converting it to its uses, as aforesaid, beyond the peculiar benefits that will accrue to such land from said acquisition and use by the United States. At the request of the Government that we should set forth in our report what portion of the just compensation represents damages to the residue (to which request defendant's counsel stated it would not object), we report that in our judgment such damages amount to $11,120.00.

II. Answer: $65,520.00.

In accordance with the directions and instructions of the Court, the commission is of the opinion and does ascertain that in the circumstances involved in the Second Inquiry, the fair market value of the Falkland Tract before the taking on October 23, 1952, was $596,000.00 and its value on said date after the taking was $530,480.00, accordingly the sum of $65,520.00 will be the just compensation, including all damages to the owner or owners of the adjacent or remaining property by reason of the acquisition of the aforesaid easement by the United States and converting it to its uses, as aforesaid, beyond the peculiar benefits that will accrue to such land from said acquisition and use by the United States. At the request of the government that we should set forth in our report what portion of the just compensation represents damages to the residue (to which request defendant's counsel stated they would not object), we report that in our judgment such damages amount to $11,720.00.

* * *

[NOTE: The recital of the commission's answers and findings with respect to the Third and Fourth Inquiries may be found in U. S. App. 184-185.]

(12). That Olive Vaughan Williams, a defendant herein, has stated in open court by her counsel, James S. Easley, that she is asserting no claim to any of the compensation which might be awarded herein other than the $1.00 which has already been paid her.

(13). The opinion of the United States Court of Appeals for the Fourth* Circuit, 235 F. 2d 327, reads:

> "If Mrs. Williams were the owner of the entire interest in the land, no one would contend that she would not be entitled to compensation for the condemnation of flowage rights by the government. Where these flowage rights have been conveyed to another, there is no reason in law, in equity, in good conscience or in common honesty why the compensation to which she would otherwise have been entitled should not be paid to one to whom such rights have been conveyed."

The rights of Virginia Electric and Power Company included the right to flood 1540 acres of the "Falkland" tract of approximately 7400 acres. When those rights were originally conveyed any damages to the residue of the land were included in the compensation paid. When the government's easement is imposed upon these same 1540 acres, the residue of the "Falkland" tract is damaged and therefore, if the ownership were in one person the compensation for the taking over these 1540 acres would include damages to the residue. The appellate Court has already decided that this compensation shall be determined and then awarded to Virginia Electric and Power Company. Therefore the issue

* Misquoted, U. S. App. 185.

which the United States now seeks to inject in the case by its aforesaid motion and offer of proof is not within the scope of the direction of the Court of Appeals.

It is therefore, adjudged and ordered by the Court:

(1). After careful consideration of the Report of the Commissioners, their Findings of Fact and the testimony and evidence in the case, it is the Court's opinion that the Report of the Commissioners and their Findings of Fact should be confirmed and adopted by the Court.

(2). After hearing further evidence on behalf of both parties and arguments of counsel, the Motion of the United States of America to Exclude Damages to Residue is overruled and the United States of America has excepted.

(3). The Court holds the Second Inquiry of the order appointing commissioners as the appropriate measure of compensation as directed by the United States Court of Appeals for the Fourth Circuit, and adopts the findings of the commissioners on such inquiry.

(4). That the just compensation to be paid by the plaintiff, the United States of America for the taking of the full, complete and perpetual right, power and privilege to overflow, permanently or intermittently, as may be necessary as a result of the construction, maintenance and operation of the John H. Kerr Dam and Reservoir, as described in the Declaration of Taking heretofore filed in this cause, shall be the sum of Sixty-five Thousand Five Hundred and Twenty Dollars ($65,520.00), exclusive of interest, and that said sum, with interest upon Sixty-five Thousand Five Hundred and Nineteen Dollars ($65,519.00) thereof from October 23, 1952, until the date of payment shall be deposited in the registry of this Court by the plaintiff, the United States of America; and

It is further ORDERED that upon receipt of the aforesaid

sum of Sixty-five Thousand Five Hundred and Nineteen Dollars ($65,519.00), with interest thereon as aforesaid, the clerk of this Court be, and he hereby is, authorized and directed to issue a check in the sum of Sixty-five Thousand Five Hundred and Twenty Dollars ($65,520.00), together with all of the interest paid as aforesaid, payable to the order of Virginia Electric and Power Company, and to mail the said check to said payee, as follows:

Virginia Electric and Power Company,
7th and Franklin Street,
Richmond, Virginia.

The clerk shall mail a certified copy of this order to the bank in which said fund is on deposit, which shall be the authority for said bank to pay the said check when presented.

It is further ADJUDGED and ORDERED that upon the payment and mailing of the aforesaid check that this judgment be, and it is hereby, satisfied.

It is further ORDERED that the clerk of this Court mail two certified copies of this order to Mr. Leigh B. Hanes, Jr., Assistant United States Attorney, P. O. Box 601, Lynchburg, Virginia; and three copies to Mr. Ralph H. Ferrell, Jr., care Hunton, Williams, Gay, Moore and Powell, Electric Building, Richmond, Virginia.

November 24, 1958.

JOHN PAUL,
District Judge.

A true copy, Teste:

CLARENCE E. GENTRY,
Clerk.

by: GRACE A. HARPER,
Deputy Clerk.

LE COPY

Office Supreme Court, U.S.
FILED
APR 14 1960
JAMES R. BROWNING, Clerk

No. ~~757~~ 49

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

VIRGINIA ELECTRIC AND POWER COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
PERRY W. MORTON,
Assistant Attorney General,
ROGER P. MARQUIS,
HAROLD S. HARRISON,
Attorneys,
Department of Justice, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 757

UNITED STATES OF AMERICA, PETITIONER

v.

VIRGINIA ELECTRIC AND POWER COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

In its petition for a writ of certiorari in this case (Pet. 8, 12, 15), the United States invited the attention of this Court to the fact that a case entitled *Augusta Power Company* v. *United States* (and reverse title), involving a similar factual situation, was then pending before the United States Court of Appeals for the Fifth Circuit (C.A. 5, No. 18150). The opinion of that court, reversing and remanding that case, has now been received and is reprinted in an Appendix, *infra*.

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While the United States does not agree with all that is stated in the Fifth Circuit's opinion, we do invite attention to the fact that that court reverses the district court, which had followed the ruling of the instant case, and expressly disagrees with the holding of the Fourth Circuit in the instant case "that the compensation to be paid is not the value of the easement to its holder 'but the difference in the value of the land with and without the flowage easement, not considering its value for water power purposes'" (Appendix, *infra*).[1]

In addition to the express conflict between circuits, we submit that the opinion in the *Augusta Power Company* case illustrates the need for clarification by this Court of the law applicable to the frequently arising flowage easement situation. For example, compare the statement of the Fifth Circuit that the Power Company should receive substantial compensation "If Augusta Power Company had been successful * * * in securing approval of the Federal Power Commission" (Appendix, *infra*) with the discussion at page 8 of our petition in the present case and with this Court's statement in *United States* v. *Twin City Power Co.*, 350 U.S. 222, 228, that "What the Government can grant or withhold and exploit for its own

[1] For the convenience of the Court a copy of the unreported opinion in *United States* v. *Cooper*, referred to in footnote 3 of the *Augusta Power* opinion, is also set forth in the Appendix, *infra*.

benefit has a value that is peculiar to it and that no other user enjoys."

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
PERRY W. MORTON,
Assistant Attorney General.
ROGER P. MARQUIS,
HAROLD S. HARRISON,
Attorneys.

APRIL 1960.

APPENDIX

In the United States Court of Appeals for the Fifth Circuit

No. 18150

AUGUSTA POWER COMPANY, APPELLANT-APPELLEE

v.

UNITED STATES OF AMERICA, APPELLEE-APPELLANT

(And Reverse Title)

Appeals from the United States District Court for the Southern District of Georgia

(April 11, 1960)

Before RIVES, *Chief Judge*, and CAMERON and WISDOM, *Circuit Judges*

RIVES, *Chief Judge:* In view of *United States* v. *Chandler-Dunbar Co.*, 1913, 229 U.S. 53, and *United States* v. *Twin City Power Co.*, 1956, 350 U.S. 222, forbidding an award against the United States in eminent domain proceedings for hydroelectric power value in an interstate navigable stream, the main problem is to discover the basis, if any, for an award to the Augusta Power Company for its flowage easements over fast lands adjacent to the Savannah River.

The United States filed and served on Augusta Power Company its petitions for condemnation and declarations of taking in four civil actions in the Southern District of Georgia, and also in certain actions in the Western District of South Carolina,

which are not involved in this appeal. In its answers to these petitions, Augusta Power Company alleged that the lands taken were part of its holdings of approximately 1,257 acres owned in fee and lying on both sides of the Savannah River and approximately 362 acres over which it had flowage easements in the Southern District of Georgia. All issues of just compensation were referred to commissioners under Rule 71A(h), Federal Rules of Civil Procedure. The amounts fixed by the Commission as compensation for the tracts over which Augusta Power Company held fee simple title were paid and accepted, leaving for consideration only the five tracts over which Augusta Power Company held flowage easements.[1]

The instruments upon which the flowage easement claims are based, executed in 1906, provided that the rights granted were "to overflow and back water upon any such portion of said tract of land and islands as they or their heirs or assigns may deem advisable in the erection of any dam or dams for the development of a waterpower on the Savannah River * * *." The Augusta Power Company conceded that "the only use of these flowage easements by anybody would be in connection with and based upon the development of a dam for water power purposes in the Savannah River."

The Commission found that the fee value of the land taken in 1947 was $40 per acre and that the fee value of the land taken in 1950 was $45 per acre. It went on to hold that 70% of the value of the land

[1] Summarized as follows:

Tract	*Acreage*	*Fee Owner*
E-404	41.70	Savannah River Electric Company
E-444	128.39	Savannah River Electric Company
E-443	88.59	Twin City Power Company
E-458	37.68	Roy Edmunds and Wayne Goolsby
E-442	101.69	Fannie Beck Reid

taken in 1947 and 75% of the value of the land taken in 1950 represented the value of the flowage easements. On this basis the Commission arrived at awards as follows:

Tract E–404: 41.7 acres at $40 an acre equals $1,668.00, 70% of which is $1,167.60.
Tract E–442: 101.69 acres at $45 an acre equals $4,576.05, 75% of which is $3,432.04.
Tract E–443: 88.59 acres at $45 an acre equals $3,986.55, 75% of which is $2,989.91.
Tract E–444: 128.39 acres at $45 an acre equals $5,777.55, 75% of which is $4,333.16.
Tract E–458: 37.68 acres at $45 an acre equals $1,695.60, 75% of which is $1,271.70.

Accordingly, the total award of the Commission to the Augusta Power Company was $13,194.41, with interest at 6% from the respective dates of taking. The district court affirmed the Commission's report in all respects.

Both parties have appealed, the United States asserting that no compensation whatsoever should have been allowed for the flowage easements, and Augusta Power Company asserting that the amounts fixed as compensation for the flowage easements are too low.

In an extensive opinion accompanying its order affirming the report of the Commission and again in an opinion overruling the motion of the United States for new trial, the district court held that the United States had constructive or actual notice of the flowage easements of Augusta Power Company, and, hence, that Augusta Power Company was not bound by prior judgments purporting to fix the value of the fee or the entire value in the lands taken in proceedings of which the Augusta Power Company had no notice. We agree with that holding. We agree also with that part of the opinions of the district court holding the easement deeds valid and enforceable as between the owners of the fee and Augusta Power Company.

The district court followed opinions of the Fourth Circuit in *United States* v. *2979.72 Acres of Land, etc.*, 1956, 235 F. 2d 327, on rehearing, 237 F. 2d 165, and in *United States* v. *Twin City Power Company*, 1957, 248 F. 2d 108,[2] in holding that the decision of the Supreme Court in the *Twin City* case, *supra*, does not preclude the payment of substantial compensation to the Augusta Power Company for its flowage easements. The district court thought it "quite clear that the government should pay a just compensation for the taking of these lands at a fair value for agricultural and forestry purposes"; and it approved the Commission's method of apportioning that value, viz: "The criterion for dividing the value of the land is 'the difference in the value of the land with and without the flowage easement'." We agree that Twin City does not preclude the payment of substantial compensation to the Augusta Power Company for its flowage easements, but we disagree as to the method of measuring that compensation.

The Government insists that "the Power Company neither had nor claimed anything but a right to flood the lands in connection with the erection of a dam or dams for the development of water power on the Savannah River—the very thing which the Supreme Court has held to be noncompensable as against the United States." The *Twin City* opinion, however, expressly "put aside such cases as *United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799, where assertion of the dominant servitude in the navigable river injured property beyond the bed of the stream" (350 U.S. at p. 225). In the case referred to, *United States* v. *Kansas City Ins. Co.*, it was held that "* * * the

[2] To which may now be added the opinion on a subsequent appeal in *United States* v. *2979.72 Acres of Land, etc.*, 1959, 270 F. 2d 707.

navigation servitude does not extend to land beyond the bed of the navigable river." Indeed, *Twin City* itself approves the test of *United States* v. *Appalachian Power Co.*, 1940, 311 U.S. 377, 427, "If the Government were now to build the dam, it would have to pay the fair value, judicially determined, for the fast land; nothing for the water power" (350 U.S. at p. 227). Very clearly, the United States is in error when it claims on page 18 of its brief that it "has a dominant servitude which it can exercise in its discretion and without compensation."

If Augusta Power Company had been successful in assembling the necessary lands,[3] and in securing approval of the Federal Power Commission,[4] and thereafter had actually exercised its easements by permanently flooding the lands, their value for agricultural and forestry purposes would have been destroyed. If, with that status, the United States had condemned the lands, the compensation due would be payable to Augusta Power Company. That compensation would not include the hydroelectric power value, but it would embrace Augusta Power's property right to destroy the value of the lands for agricultural and forestry purposes.

At the other extreme, if factors such as difficulty of assemblage of all necessary lands, the increasing economic advantage of steam plants over hydroelectric plants, the need for additional power in the particular area, etc., had made it certain that the flowage easements would never be exercised by the Augusta Power Company or its assigns, *excluding the United States*,[5]

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[3] Compare *United States* v. *Cooper*, 5 Cir. No. 17946, m/s, decided March 24, 1960, and cases cited.

[4] See 16 U.S.C.A. § 797(e), et seq.

[5] The United States must be excluded as a possible assignee in determining the value of the easement, because the value of

then such compensation as might be due would be payable to the owners of the fee title and nothing to the Augusta Power Company.

Between the two extremes just illustrated, the respective values of the fee and of the easement would fluctuate from time to time depending on the probability or improbability of actual exercise of the easement by the Augusta Power Company or its assigns. If all interested parties were before the Court, the *maximum* which the United States would be required to pay would be the value of the lands, not including their value for hydroelectric power purposes. That is, however, a *maximum*, and not necessarily the measure of what the United States would have to pay under any and all circumstances. As said by Mr. Justice Holmes, speaking for the court in *Boston Chamber of Commerce* v. *Boston*, 1910, 217 U.S. 189, 195:

> But the Constitution does not require a disregard of the mode of ownership—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is what has the owner lost, not what has the taker gained. We regard it as entirely plain that the petitioners were not entitled as matter of law to have the damages estimated as if the land was the sole property of one owner * * *

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the easement must not be enhanced by the special need which the Government has for it. The Government should not, in fairness, be required to pay a value created by itself. *United States* v. *Cors*, 1949, 337 U.S. 325, 333, 334; see also *United States* v. *Chandler-Dunbar Co.*, 1913, 229 U.S. 53, 76.

See also, *United States* v. *Chandler-Dunbar Co., supra,* 229 U.S. at p. 80.

The compensation to be paid is the value of the interest taken. *United States* v. *General Motors Corporation,* 1945, 323 U.S. 373, 379. The flowage easement doubtless lessens the value of the fee-owner's interest, but it does not necessarily follow that the amount of such decrease and the value of the flowage easement to its owner are identical. The Augusta Power Company is limited to the value of the legal rights which it possesses. As said by this Court in *Messer* v. *United States,* 5 Cir., 1946, 157 F. 2d 793, 795, n. 5:

> Where, as here, the Government settles with the owner of one interest, the question of compensation for all interest is irrelevant; only the question of just compensation for the interest taken concerns the Government. *United States* v. *Petty Motor Co.,* 1946, 327 U.S. 372, 374, 66 S. Ct. 372.

Thus, we agree with the Fourth Circuit that the *Twin City* case does not preclude the payment of substantial compensation for flowage easements over fast lands adjoining a navigable stream, but, with much deference, we disagree with its holding that the compensation to be paid is not the value of the easement to its holder "but the difference in the value of the land with and without the flowage easement, not considering its value for water power purposes." *United States* v. *2979.72 Acres of Land, etc.,* on rehearing,

1956, 237 F. 2d 165, 166.[6] It seems to us that the *maximum* compensation payable for the flowage easement under any conceivable circumstances is so much of the value of the lands for agricultural and forestry purposes and for any other uses, not including hydroelectric power value, as the easement owner has a right to destroy or depreciate. That *maximum* is more simply expressed in the criterion adopted by the Commission, i.e., "the difference in the value of the land with and without the flowage easement." Subject to that *maximum*, the actual *measure* of compensation payable for the flowage easement is the value of the easement to its owner. "The question is, What has the owner lost? not, What has the taker gained?" 1 Orgel on Valuation Under Eminent Domain, p. 352.

The United States insists that the Augusta Power Company failed to show any substantial value for its easements, while the Power Company asserts that the amounts fixed as compensation for the flowage easements are too low. Since an erroneous standard was used for valuing the flowage easements, and since much confusion and uncertainty existed as to what was the correct standard, we consider it "just under

[6] See, also, the holding on original hearing that "the government must make compensation on the basis of the difference in the value of the land with and without the easement taken * * *." *United States* v. *2979.72 Acres of Land, etc.*, 4 Cir., 1956, 235 F. 2d 327, 329. *United States* v. *Twin City Power Co.*, 4 Cir., 1957, 248 F. 2d 108, 113, 114; *United States* v. *2979.72 Acres of Land, etc.*, 1959, 270 F. 2d 707, 709.

the circumstances"[1] to reverse the judgment and remand the cause for further proceedings not inconsistent with this opinion, and it is so ordered.

Reversed and Remanded.

In the United States Court of Appeals for the Fifth Circuit

No. 17946

UNITED STATES OF AMERICA, APPELLANT

v.

SARAH JOYCE KING COOPER, ET AL., AS EXECUTRICES OF THE WILL OF M. A. COOPER, DECEASED, ET AL., APPELLEES

Appeal from the United States District Court for the Northern District of Georgia

(March 24, 1960)

Before RIVES, *Chief Judge,* and HUTCHESON and TUTTLE, *Circuit Judges*

TUTTLE, *Circuit Judge:* This is an appeal from a judgment based on a jury verdict in a land condemnation case. Although there are other questions raised, the principal contention made by the government is that the trial court erred in permitting the jury to pass on the value of appellees' lands as having potential value as a dam site. This argument has a triple base. First, the government argues the Etowah River is navigable, and the case is therefore ruled by *United States* v. *Twin City Power Co.,* 350 U.S. 222; second, it argues that if not navigable, the Etowah was tributary to a navigable river (which is undisputed) and

[1] 28 U.S.C.A. § 2106.

thus subject to the paramount right of the Federal Government's control under the Commerce Clause of the Constitution, and thus the case should be ruled by the principle of the *Twin City Power Co.* case; third, that there was no proof on which the jury could base a finding that the use of the property for a dam site was reasonably probable within the reasonably near future and that the issue should not have been submitted to the jury.

As is strongly recommended in cases in which there is a separable disputed element of damage which the trial court feels should be passed on by the jury, the parties stipulated that separate verdicts be submitted: (*a*) the value with a water power element included, and (*b*) the value without such water power element. The jury found that value should be included for the potential water power usage and rendered a verdict for $100,000, including that value; it returned a verdict for $57,500 if hydroelectric power value was not to be included.

In the view we take of the case it is not necessary for us to pass on the question whether the Etowah River was navigable. Nor is it necessary for us to determine whether the principle enunciated by the Supreme Court in the *Twin City Power Co.* case, *supra,* is to be expanded to cover non-navigable rivers and streams. This precise question appears to be before the Supreme Court in *United States* v. *Grand River Dam Authority,* * * * U.S. * * *, certiorari granted on December 19, 1959, to the Court of Claims in the case of *Grand River Dam Authority* v. *United States,* 175 F. Supp. 153.

We conclude that there was a complete failure of proof that there was a reasonable probability that this land would be used for a dam site within the rea-

sonably near future[1] by any one other than the Federal Government. The trial court clearly submitted to the jury, over appellant's objection, the question whether such a reasonable probability existed. The charge was:

> No consideration shall be given to nor allowance of just compensation made for any element of value depending on future events, circumstances or a combination of circumstances which, while within the realm of possibility, had not been shown by a preponderance of the evidence to be reasonably probable in the reasonably near future after the taking date.

This part of the charge is in part of the language of the Supreme Court in *Olson* v. *United States*, 292 U.S. 246. In the *Olson* case the court used this language in an opinion by which it affirmed the judgment of the lower court ruling out proffered testimony seeking to establish the fact of reasonable probability. The situation is different here, because the trial court not only permitted all the proffered testimony on behalf of appellees, but also ruled that it was sufficient to warrant a jury finding in their favor.[2]

The only testimony on this issue was given by Mr. B. M. Hall, Jr., a qualified hydroelectric engineer. We do not question either this witness's qualifications or his competence in arriving at the conclusion to which he testified when he gave the firm opinion that

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[1] Appellees frankly concede, as they must "that in order for this special adaptability to be considered, there must be a reasonable probability of the lands in question being combined with other tracts for this special or higher use in the reasonably near future. *Olson* v. *United States*, 292 U.S. 246, 255–256; *Continental Land Co.* v. *United States*, 88 F. 2d 104, 111, cert. denied, 302 U.S. 715."

[2] Both by a pretrial ruling, a continuing objection allowed by the court at the beginning of the trial, and by objection after the conclusion of the court's charge, appellant effectively raised the issue and preserved it for appeal.

this land *could* be used as the foundation for one end of a high dam (100 to 135 feet as testified to by him) for the creation of hydroelectric power on a commercially profitable basis.[3]

Having testified that there were no comparable sales of such fast lands on which to base an opinion of value, the witness stated that he arrived at his opinion touching on the value of this site by what he called the "steam comparison method." He was asked what in his opinion was the fair market value of the land in question as a potential dam site. His answer was, "not less than $200,000."

However, in addition to proof that the land offered a site on which it would be *practicable* to build a dam for the creation of hydroelectric power, it was incumbent on the plaintiffs to prove that there was also a *reasonable likelihood* that it *would* be so used in the *reasonably near future*. *Olson* v. *United States, supra,* p. 256; *United States, ex rel TVA* v. *Powelson,* 319 U.S. 266, 275. Any failure in this regard was clearly saved for review by the government both in its objection to the evidence and in its motion that the entire issue of water power value be excluded from the jury's consideration. There can be no doubt that the court's attention was called to the inadequate and speculative character of the testimony.

An expert witness may give his opinion based on assumptions stated by him. However, if the assumptions needed to support the opinion are not proved, or at least testified to, and are not otherwise taken to be true, the opinion is worthless. See *International Paper Co.* v. *United States, supra,* in which we stated: "Of course, opinion evidence may of itself be substan-

[3] We are here separating the issue of commercial practicability of using this land as a dam site from the other issue, i.e., the reasonable likelihood that it would be so used in the reasonably near future for this discussion.

tial enough to take a case to the jury. However, an opinion is no better than the hypothesis or the assumption upon which it is based." 227 F. 2d 201, 205. Here, moreover, it is plain that the witness Hall was not qualified as an expert on the issue of probability of use within the reasonably near future. He was qualified as a hydraulic engineer. As to matters touching on such problems he could testify if an adequate hypothesis was given. The question whether it was reasonably probable that the land would be used in the reasonably near future must be established to the jury's satisfaction. Hall's unsupported statement that "there was a good probability of using the Cooper lands in connection with other lands for the purpose of building a hydraulic dam there,"[4] did not supply

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[4] His entire opinion on this point was expressed in the following series of questions and answers:

"Q. Could the Cooper lands have been put to use for hydro-electric purposes in the reasonably near future from June 12, 1946?

"Mr. CLEMMONS. I object to that without showing it was reasonably probable that there would be a demand and that the value had been enhanced for this particular value.

"The COURT. That's a rather broad question. Conceivably any land of this nature could be used for hydro-electric power. I think an answer to that question would entail a great many factors, Mr. Maddox. If you lay the foundation for it, he can answer it.

"Mr. MADDOX. May I ask, could the Cooper land have been put to use for hydro-electric purposes in June of 1946?

"Mr. CLEMMONS. Same objection, your Honor.

"The COURT. Do you mean profitably put to those purposes?

"Mr. MADDOX. Yes, sir, I am going to ask him one step at a time.

"The COURT. I'm going to let him answer the question, but, of course, as Mr. Clemmons said, there would have to be at that time a sufficient probability of that use as to then have affected the market value, but I'll let him answer the question.

the lack of evidentiary facts on which the jury could make its own finding.

"By Mr. MADDOX:

"Q. Could it have been put to that use in June of 1946?

"A. Yes, in my opinion it could have.

"Q. Was it in fact put to that use within the next year or two?

"A. Yes, sir.

"Q. Could it have been foreseen on June 12, 1946 that it would reasonably be put to use for those purposes in the near future?

"Mr. CLEMMONS. I object to that unless he excludes governmen. l use.

"The COURT. I take your question to contemplate whether or not it could have been probably used, all the elements which he has covered, confining it to that. I will let him answer the question. That is, all the physical elements.

"Mr. MADDOX. Yes.

"The COURT. He can answer the question.

By Mr. MADDOX:

"Q. Would you answer it? Could it in June of 1946 have been reasonably foreseen then that it would be put to this use in the near future?

"A. Yes, sir.

"Q. On June 12, 1946, was there a possibility of using the Cooper lands in connection with other lands for the purpose of building a hydro-electric dam there?

"A. Yes, in my opinion there was a good probability.

"Q. On June 12, 1946, would it have been economically feasible for private business to have used the Cooper Dam Site in combination with other lands to build a hydro-electric power dam and plant located there?

"A. Yes, sir."

It will be noted that none of the questions, until the very last one, incorporated the idea of use for a dam site exclusively other than the government. The last question which alone related to its use "for private business" reverts to the economic feasibility of it and not to the reasonable likelihood that it will be so used.

Of course, it was perfectly clear in June 1946 that the lands could be used for hydroelectric purposes because the very dam for which they were subsequently taken had already been authorized by Congress.

Although the witness's testimony as to possible future use did not refer to future use by others than the United States government, and the United States Attorney sought to clarify this point by his objection (see footnote 4), nevertheless we can assume for the purpose of this discussion that the witness really intended to say more in that respect than he actually did say, for even on this assumption the absence of a factual basis for his opinion robbed it of any evidentiary value.

That this is so is plain when it is considered that there was evidence that the land necessary to construct the dam and reservoir involved more than 10,000 acres owned by many land owners, but there was no testimony as to how many tracts were involved; there was no evidence as to what roads, bridges, public utilities, municipal facilities and the like would be flooded, and as to which rights must therefore be secured if a high dam was to be built, and so, too, there was no evidence, not even an estimate, as to how much it would cost to assemble all the property rights needed; moreover, it was not suggested that all the property could be acquired by private negotiation at any price, much less at a commercially feasible one, without the necessity of resorting to the power of eminent domain. Certainly, there was nothing before the jury that would permit it to find that the lands would be likely to be assembled without use of eminent domain. The Supreme Court, of course, has held in *United States, ex rel TVA* v. *Powelson*, *supra*, that if the acquisition or assembling of property for development of a dam site requires the use of the state's power of eminent domain the likelihood of such use for the land cannot be considered in federal condemnation proceedings. To the same effect see *McGovern* v. *New York*, 229 U.S. 363, 372.

In the absence of any evidence as to all of these matters there was no basis on which the jury could determine the issue presented to it when the trial court charged it, (see above) "no consideration shall be given to nor allowance of just compensation made for any element of value depending on future evidence, circumstances or a combination of circumstances which, while within the realm of possibility, *had not been shown by a preponderance of the evidence* to be reasonably probable in the reasonably near future after the taking date." Here there was no evidence that the use of the property for a dam site was anything more than a mere "possibility." The unsupported opinion of the hydraulic engineering expert that there was "a good probability" of using these lands in connection with others for the purpose cannot supply the basis for such a finding by the jury. For the proposition that an opinion of an expert witness not based on adequate factual foundation is without probative value, see our recent case of *Nashville Bridge Co.* v. *Ritch*, 5 Cir., —— F. 2d ——, decided February —, 1960.

It is not to be taken from what we have said above touching on the use by a private party of the power of eminent domain that we are here stating that the availability of the power of eminent domain in the assembling of lands for public works may not have its effect on giving value to such properties. The availabiilty of the power of eminent domain to assist either a public utilities corporation or an individual to acquire properties for power purposes, may, and undoubtedly sometimes does, create speculative values in such lands, actually resulting in the purchase and sale of such properties on the market. Where a market value is created by such activity, the owner is entitled to be paid at such market value even though it

has been enhanced by the public's acceptance of the possibility that the power of eminent domain may make possible the building of a power facility. This is well explained in *Olson* v. *United States, supra,* where on page 256 the Court says:

> * * * It is common knowledge that public service corporations and others having that power frequently are actual or potential competitors, not only for tracts held in single ownership but also for rights of way, locations, sites and other areas requiring the union of numerous parcels held by different owners. And, to the extent that probable demand by prospective purchasers or condemnors affects market value, it is to be taken into account.

Here this element of eminent domain does not arise because the valuation expert testified that he knew of no sales of comparable properties. The parties seem to agree that there had been none for a period of many years anywhere in the state of Georgia.

The cases of *Olson* v. *United States, supra; McGovern* v. *New York, supra,* and *United States, ex rel TVA* v. *Powelson, supra,* are cases in which the Supreme Court held evidence proffered to prove the existence of a reasonable likelihood of a special use in the reasonably near future was insufficient *even to be submitted to the fact finding tribunal. McCandless* v. *United States,* 298 U.S. 342, is a case in which the court held proffered testimony as to probable future use was of sufficient probative value to warrant its being considered by the trial court. The record here discloses that the evidence actually submitted fails to provide more than a basis for speculation by the jury, a thing which the Supreme Court in the Olson case said was "to be condemned in business transactions as well as in judicial ascertainment of truth."

The government also vigorously attacks evidence of a further special use, that is, use of these lands as a site for "washer ponds," a sort of artificial pond to be used in connection with surface mining. It is true that the witness initially indicated that he arrived at a value of the lands by computing the total estimated income that under this hypothesis would have been received from them in the mining process, even though such receipts would extend over a period of some ten or more years. We conclude that, however unrealistic his opinion might be if based on the assumption that the estimated figure of $153,750 payable over ten years would of itself give them a value at the time of taking of $153,750, the opinion was not solely based on such an assumption. The opinion was admissible and its weight was for the jury to assess. It is clear that the jury heavily discounted the testimony of valuation assigned to the lands as washer pond sites.

The government also contends that the trial court erred in sustaining an objection to proffered testimony by a government witness when he was asked whether in his opinion the Federal Power Commission would grant a license to build a private dam on the site in question after congressional action had been taken assuming paramount jurisdiction over the entire river system. It was, of course, a matter of great significance in any valuation of the lands in question as a potential power site that the Federal Power Commission had the undoubted power to refuse the grant of a license. Even so, we think the trial court correctly ruled that a witness could not properly attempt to testify as to his opinion on what action a federal agency might or might not take in the premises. This was a matter open to cross examination of appellees' witnesses in order

to test out the degree of importance attributed by them to this possibility. It was also a matter for argument to the jury, if the issue had otherwise been properly submitted to the jury.

We conclude that the alternative verdict of $57,500 for the value of the property, without giving effect to its potentialities as a power site must be accepted and that the verdict which included compensation for the power increment must be set aside.

The judgment is REVERSED and the case REMANDED for further proceedings not inconsistent with this opinion.

U. S. GOVERNMENT PRINTING OFFICE: 1960

COPY

No. 49

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, PETITIONER

v.

VIRGINIA ELECTRIC AND POWER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
PERRY W. MORTON,
Assistant Attorney General,
ROGER P. MARQUIS,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court did not write an opinion. The opinion of the court of appeals (R. 329–338) is reported at 270 F. 2d 707. Earlier opinions in this case are reported at 218 F. 2d 524, judgment vacated and case remanded, 350 U.S. 956, O.T. 1955, No. 41; and at 235 F. 2d 327, rehearing denied, 237 F. 2d 165 (R. 75–83).

JURISDICTION

The judgment of the court of appeals was entered October 5, 1959 (R. 338). On December 30, 1959, the time within which to petition for a writ of certiorari was extended, by order of Mr. Justice Black, to March 3, 1960 (R. 339). The petition for a writ of certiorari

was filed on that date and certiorari was granted on April 18, 1960, 362 U.S. 947. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Act of December 22, 1944, c. 665, 58 Stat. 887–888, 891–892, 894, provides in pertinent part:

> In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.
>
> * * * * *
>
> SEC. 10. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized in the interest of the national security and with a view towards providing an adequate reser-

voir of useful and worthy public works for the post-war construction program, to be prosecuted under the direction of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein * * *.

* * * * *

ROANOKE RIVER BASIN

The general plan for the comprehensive development of the Roanoke River Basin for flood control and other purposes recommended by the Chief of Engineers in House Document Numbered 650, Seventy-eighth Congress, second session, is approved and the construction of the Buggs Island Reservoir [name changed to "John H. Kerr Dam and Reservoir," 65 Stat. 616, 617] on the Roanoke River in Virginia and North Carolina, and the Philpott Reservoir on the Smith River in Virginia, are hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in that report at an estimated cost of $36,140,000.

QUESTIONS PRESENTED

1. Whether the United States is required to pay a power company, as compensation for the frustration by condemnation of a flowage easement owned by the power company over land riparian to an interstate navigable stream, the value of the subservient land for agricultural or forestry uses.

2. Whether such compensation must also include so-called severance damage to the remaining part of the tract not embraced in the power company's easement.

STATEMENT

This is a sequel to the case of the same name before this Court in No. 41, October Term, 1955, in which certiorari was granted, the judgment was vacated, and the case was remanded to the court of appeals for further consideration in the light of *United States* v. *Twin City Power Co.*, 350 U.S. 222. *United States* v. *Virginia Electric & Power Co.*, 350 U.S. 956. The facts of the case in its current posture may be summarized as follows:

The Dan River, the principal tributary of the Roanoke River, is a navigable stream. In 1944, Congress, declaring its intention "to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized", approved projects in various areas of the country, including a general plan for the comprehensive development of the Roanoke River Basin as "recommended by the Chief of Engineers in House Document Numbered 650, Seventy-eighth Congress, second session." Act of December 22, 1944, 58 Stat. 887, 888, 894 (*supra*, pp. 2–3). By the same Act and in implementation of the plan, Congress authorized "the construction of the Buggs Island Reservoir on the Roanoke River in Virginia and North Carolina [now known as John H. Kerr Dam and Reservoir]", the project here involved. As stated in House Document No. 650, 78th Cong., 2d Sess., the specific navigation purposes of the project are "regulation of stream flow" and "assur[ing] the necessary minimum low flows" for completion of the channel between Palmyra Landing and Weldon in North

Carolina (pp. 8–9, 76–77).[1] The other principal objectives are flood control and power production (pp. 8–9, 80–81).

Proceedings to acquire the lands needed for this project included a suit instituted in the United States District Court for the Western District of Virginia, in which the United States proceeded, *inter alia,* to impose by condemnation a flowage easement over the tract now involved, riparian to the Dan River (R. 1–8). The issue was how much compensation was owed for the imposition of that flowage easement and to whom it should be paid, no question as to right to condemn being presented.

The United States initially proposed to condemn the fee title of this particular tract, which is part of a large (7,400 acre) estate (called the Falkland Estate). However, at the urgent request of the fee owner, the estate to be taken was reduced to a flowage easement, leaving the owner both with subsurface rights and control of the shore, subject to federal access for operational purposes (R. 158–165). In exchange, the fee owner (Mrs. Olive Vaughan Williams) offered an "Option for Purchase of Flowage Easement", with detailed stipulations accepted on behalf of the United States, in which she settled her

[1] It is believed unnecessary to deal further with the interstate, navigable nature of the Dan River since opinions of the court of appeals assume navigability of the river (R. 76, 79, 330–331) and respondent has not argued otherwise. See S. Rep. No. 83, 80th Cong., 1st Sess. (1947), p. 1, stating categorically that the "Dan River is an interstate water, being navigable in North Carolina and Virginia"; H. Doc. No. 65, 74th Cong., 1st Sess. (1935), p. 25.

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claims arising out of the taking of the flowage easement. The instrument recited that it was "[i]n consideration of One Dollar ($1.00) and other valuable considerations" and released "all damages and claims whatsoever" (R. 58–67).

The respondent Power Company held a long-dormant flowage easement over the tract. The 1,840-acre tract (FF–3100E) is comprised of six parcels. Parcel A, containing 1,762.8 acres, lies immediately adjacent to the Dan River (R. 4–6). Parcels B, C and D, containing 44.4, 21.2 and 7.2 acres, respectively, are islands in the bed of the Dan River (R. 6–7). Parcels E and F are small parcels 3.6 acres and 0.8 of an acre, respectively, not immediately adjacent to the river (R. 7–8). Respondent's interests in the parcels of land of which Tract FF–3100E is a part were described in a statement of facts agreed upon at pretrial conference as (R. 69):

> Water rights, water power and water privileges, including the right to construct and maintain a dam or dams or other works on said lands and to raise the water at the head of Hyco Falls in the Dan River six feet above the usual water level without compensation for damages caused thereby.

The Government's settlement with Mrs. Williams was expressly subject to "such water, flowage, riparian and other rights, if any" of the Power Company (R. 63). Thus, the sole question litigated in these proceedings was the compensation, if any, owing to the Power Company.

Like the claims asserted by the Twin City Power Company in then pending condemnation cases, the

Virginia Electric and Power Company here claimed substantial compensation for its rights "due to the location of the land involved and its availability, at the time of the taking and in the reasonably near future, for water power development purposes" (R. 22). Unlike the *Twin City* cases, the alleged value of the respondent Power Company's flowage right was thought to be, in the words of the trial court, "the fee simple value of the land" (R. 45; see also R. 35). When the Twin City claim was rejected by this Court, *United States* v. *Twin City Power Co.*, 350 U.S. 222, the Court remanded this case for re-examination in the light of that decision. *United States* v. *Virginia Electric & Power Co.*, 350 U.S. 956 (R. 77).

Thereafter, the court of appeals, following argument, vacated the judgment of the district court and remanded the case. Its opinions on remand recognize that availability of the land as a site for water power development could not be considered, but hold that this Court's decision did not exclude compensation for other elements of value, such as value for agricultural or grazing purposes (R. 78–83).

On remand, the district court overruled a demand by the United States for a jury trial and appointed commissioners to determine the award to be made to the respondent (R. 84–89). The commissioners were instructed, *inter alia* (R. 90–91): "In making your determination of fair market value, you should disregard the fact that Virginia Electric and Power Company has a perpetual flowage easement over some of the land involved in this case and that the owner of the fee, Olive Vaughan Williams, and the

United States made an option contract dated April 30, 1951, and you are further instructed that you should not attempt to determine the value of the respective interests of the owner of the fee or of such flowage easement." The district court adopted the commissioners' answer to one of the inquiries propounded to them and awarded respondent $65,520, an amount somewhat greater than the previous award of $61,600, which had been based upon the fee simple value of the land over which the Power Company claimed flowage rights (R. 145–149). The *"res"* valued was the difference between the value of the Falkland Estate (of some 7400 acres) free of servitude and the value of such estate when subjected to a flowage easement embracing some 1540 acres.[2]

The evidence of value upon which the award was based consisted of testimony offered by respondent as to the value of the 1540 acres for agricultural and

[2] The "Second" inquiry posed to the commissioners, which the district court adopted as the proper measure of value in this case, is (R. 145, 149): "Second: What is the difference between the fair market value of the Falkland Tract, consisting of 7400 acres, with and without the servitude of the Government's easement, as described in Exhibit B hereto attached, assuming for the purpose of this inquiry that said easement is over the land in Tract FF–3100E up to contour 321 only, involving 1540 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?"

Counsel for the United States made clear its objections to the inquiries and instructions propounded to the commissioners (R. 155, 156–157). A motion to clarify the record in this respect had also been filed (R. 95–98). The Government additionally submitted requested instructions to the commissioners which were denied by the district court (R. 91–95, 98).

grazing purposes. Respondent offered no evidence of its ability to make any use of the flowage easements.

Included in the total award of $65,520 was the sum of $11,720, representing so-called severance damage to the residue of the tract, *i.e.*, to the portion which would not be subjected to flooding (R. 147). A motion to exclude this item from the award was overruled by the district court (R. 139–142, 149).

On appeal, the entire award was sustained.

SUMMARY OF ARGUMENT

I

Compensation has been awarded respondent power company on the theory that the United States, in taking a flowage easement from the fee owner, has deprived respondent of the value of its outstanding flowage easements. In measuring that value, the courts below have awarded respondent compensation on the basis of the estimated worth (for agricultural and grazing purposes) of the servient land, *i.e.*, the acreage which is subject to the easements.

The value of respondent's easements cannot be equated, however, with the value of the servient fee. An easement is not an estate or possessory interest, but merely a right to make a limited use of land which is in the possession of another. A single tract of land may be subject to numerous easements and yet retain great value.

Far from being equivalent to fee value, the easements of the power company have no more than nominal value. This is so because the prospect of putting those easements to use was never more than

remote and because that prospect was at all times conditioned upon the prior grant of a federal license.

Respondent's easements had been dormant for many decades and respondent had never gone so far as to assemble the lands requisite for an integrated dam site. Moreover, the limited prospect that the easements might, some day, prove productive had terminated well in advance of the condemnation proceedings. It disappeared, at the latest, when Congress determined that a federal power project would be built at the site.

Respondent is in fact seeking compensation for the frustration of a business hope and expectancy—the expectancy that it might be licensed to place a dam in the navigable river. There is no claim here that the flowage easements had any possible utility save in conjunction with a power project. Both *United States* v. *Twin City Power Co.*, 350 U.S. 222, and *United States* v. *Grand River Dam Authority*, 363 U.S. 229, establish the proposition that when the United States, in the exercise of its commerce power, undertakes a project, it need not pay compensation because the decision to exercise federal prerogatives frustrates the business opportunities of others.

Respondent has offered no proof showing that a willing buyer would have paid anything for flowage easements in the face of the Government's preemption of the opportunity to build a dam and flood the acreage in question. Instead, respondent has offered evidence as to what the land is worth to someone else—to the fee owner. The supposition, accepted by the courts below, that the fee owner, "having con-

veyed the flowage rights to the power company * * * thereby destroyed the value of the fee," is untenable. For many decades since the power company obtained its easements, the land has been put to productive use by the fee owner alone. The easements, on the other hand, had never been put to the only use which they in terms permit. Nor does the supposition take account of the consideration, confirmed by events, that the easements might never become viable because a license might never be issued.

The court of appeals' approach is not only untenable because of the contingencies and conditions to which exercise of the easement rights was subject; it is also open to the objection that it would appraise the power company's property interest on the "illegitimate" basis of its capacity "to injure or hinder another" (*Consolidated Gas Company* v. *City of New York*, 157 Fed. 849, 874 (C.C.S.D.N.Y.)), rather than by reference to the affirmative use to which that interest might be put by the holder. See *Roberts* v. *New York City*, 295 U.S. 264, 283. It is well settled, moreover, that the grantee of an easement can complain of interference by subsequent grantees of the fee owner only if he can establish that they are in fact impairing his active enjoyment of his right of use.

The court below was apparently of the view that if fee value were not awarded to the power company, the United States would get "something for nothing." The Government is not seeking a windfall but is seeking, rather, to avoid two possibilities of which it is apprehensive as a result of this decision—that of

paying the wrong person and that of being required to pay twice.

A corollary of the proposition that respondent's rights were not productive or valuable and had in practical effect expired before the date of condemnation is the proposition that the value of the servient fee stood substantially unimpaired by the outstanding easements at the time of the federal taking. At most, the power company easements were a cloud on title. To the limited extent that this cloud may have diminished the market value of the fee, the diminution is one for which the private parties involved, and not the United States, are responsible. *Boston Chamber of Commerce* v. *Boston,* 217 U.S. 189, 195.

Our view, in short, is that the fee owner is entitled to the fee value. The fortuitous circumstance that the fee owner in this case desired to convey a flowage easement, rather than a fee, to the United States and that she deemed one dollar adequate monetary consideration because she wished to enjoy the benefits of having an artificial lake upon her estate, cannot enlarge the rights of others or confer upon them a right to compensation for legal interests which are not theirs. *United States* v. *Petty Motor Co.;* 327 U.S. 372, 376.

II

The court below has approved an award which included an item of $11,720 for so-called "severance damages." But since the tract of land which will remain unflooded by the federal project is one in which the power company has no interest of any kind or description, this element of the award is entirely

without basis. Moreover, the severance damage rule is applicable only where there is a tract in one ownership and there is a unity of use as between the part taken and the remainder.

ARGUMENT

I. THE RIGHT OF USE REPRESENTED BY RESPONDENT'S EASEMENTS HAD NO SUBSTANTIAL VALUE BECAUSE PROSPECT OF ENJOYMENT WAS NEVER MORE THAN REMOTE AND WAS IN ALL EVENTS CONDITIONAL UPON THE PRIOR GRANT OF A FEDERAL LICENSE. THE UNITED STATES MAY NOT BE REQUIRED TO PAY COMPENSATION BECAUSE THE EXERCISE OF ITS PREROGATIVES HAS FRUSTRATED RESPONDENT'S EXPECTANCIES.

Respondent's right to compensation in this case depends upon a determination as to the nature of the interest of which it has been allegedly deprived. The court below has accorded compensation *as if* the interest of respondent were the equivalent in value of a fee interest. Thus, the compensation awarded is based upon the estimated value of the 1540 acres in question for agricultural and grazing purposes.

It is undisputed, however, that respondent owned no interest in fee; rather, it was the possessor of long-dormant easements. An easement is not an estate in land, or, indeed, a possessory interest at all. It is a right to make a limited use of land which is in the possession of another. American Law Institute, *Restatement of Property,* Sec. 450. The value of that interest is necessarily circumscribed by the capacity of the easement holder to engage in the activity which the easement describes. It is not only possible, but commonplace, for a single tract of land to be subject to a variety of uses, both by those who

own possessory interests and by numerous easement holders. See *Chicago, Burlington and Quincy Railroad Co.* v. *Chicago*, 166 U.S. 226; *Northern Pac. Ry. Co.* v. *North American Tel. Co.*, 230 Fed. 347 (C.A. 8).[1]

The right which respondent obtained by virtue of its easements was a right to build a dam (subject, of course, to the requisite grant of authority from the United States) at a specified point on the navigable Dan River and to flood a designated portion of the riparian land in conjunction with the operation of such a dam. The parties to this case have agreed (R. 69) that the rights embraced by respondent's easements were as follows:

> Water rights, water power and water privileges, including the right to construct and maintain a dam or dams or other works on said lands and to raise the water at the head of Hyco Falls in the Dan River six feet above the usual water level without compensation for damages caused thereby.

To establish that an easement has more than nominal compensable value, one must show that the use which is being impaired or foreclosed was an actual or probable use, not one merely remote or speculative. *Chicago, Burlington* case, *supra*. One must show further that exercise of this right of use was not conditional upon the "taker's" permission or license. Respondent cannot meet these requirements.

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[1] There is nothing to prevent an owner of land from granting similar easements to a number of persons. See *infra*, p. 20.

A. That there was no reasonable probability that respondent's easements would be put to actual use is, of course, strongly suggested by the fact that they had been dormant for many decades. There is, however, a more fundamental consideration. To put the easements to the only use which they permitted would necessarily require a federal license. There is no claim by respondent that it might have flooded the land in question—or, indeed, that it would have had any means of doing so—other than by harnessing the waters of the navigable Dan River. In a word, the prospect of flooding the land depended entirely upon grant of a federal permit authorizing respondent to place works in the river. That prospect had expired well before this action in condemnation was instituted. It disappeared, at the latest, when Congress determined that a project at the location in question should be built by the United States.

To state the matter another way, what respondent actually seeks—though in deference to this Court's decision in *United States* v. *Twin City Power Co.*, 350 U.S. 222, it avoids the formulation—is value for its interest in land predicated upon the utility of that property interest in conjunction with a power project.

To be sure, it was the United States which frustrated any prospect that respondent might have had of building a dam at the site. But, as this Court made clear in the *Twin City* case and even more recently in *United States* v. *Grand River Dam Authority*, 363 U.S. 229, when the United States, in the exer-

cise of the commerce power, undertakes a project, "it is exercising established prerogatives and is beholden to no one" (363 U.S. at 233); it need not pay compensation because the decision to exercise those prerogatives frustrates hopes, expectancies or business opportunities. *Id.*, p. 236.

B. The infirmity of respondent's position is also demonstrated by the fact that it has obtained compensation on the theory that the value of its easement was measurable by the agricultural or grazing value of the servient land, albeit the only right conferred by the deeds upon which it relies is a right to flood the land in the event that it builds a dam in the adjacent river. Refraining from offering to prove that this right was viable or productive, respondent shows what the servient land was worth to someone else—the owner in fee. Plainly, a willing buyer would buy an easement for a sum approximating fee value only if it appeared that the seller could convey an unrestricted and unconditional right of use which, for all practical purposes, would exclude all other uses. Yet, it appears that respondent's right of use was never more than conditional and speculative. Apart from the fact that it had never assembled the land necessary for an integrated power site (R. 17, 20), its hopes of building a power project had completely expired before the date of the condemnation proceeding. Accordingly, it is not surprising that respondent offered

no evidence as to the price at which it might have sold its "right" to flood the acreage.[4]

The court below seriously errs when it suggests that the owner of the fee, "having conveyed the flowage rights to the power company * * *, thereby destroyed the value of the fee" (R. 330).[5] This suggestion can hardly be squared with the fact that, for many decades since the conveyance of the easements, the fee owner alone has put the property to productive use.[6] Nor does it take account of the consideration, confirmed

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[4] It is evident that a purchaser, knowing that the Federal Government was planning to exercise its overriding authority, would simply be buying a lawsuit.

[5] The notion embodied in the opinion of the court below that the United States could have obtained all it needed from the power company is erroneous. The deeds involved are clear that the easement to the power company was for the possible building of dams, power houses, etc. "in the development of the water power aforesaid of the Dan River" (R. 174–175). The flowage easement acquired by the United States was for the much broader purposes of "a flood control project and for other public uses incident thereto" (R. 3, 9), including "substantial benefit to navigation." 58 Stat. 887, 888.

[6] A ready illustration of the substantial value which the fee owner, Mrs. Williams, had in the tract involved is the fact that she sold timber from the tract (R. 90). The growth of timber was considered by respondent's witness Raleigh M. Felton to be the highest and best use of the property (R. 133). Indeed, he considered the land involved as "primarily a timber tract" (*ibid.*). The fact that Mrs. Williams had rights to the substantial value represented by the forestry use is also emphasized by respondent's Exhibit C (R. 172–177). The deed there set forth grants a right, *in connection with any power development*, to cut and remove trees as necessary for a right of way for transmission and telephone lines, but any acreage so used for such lines must be paid for independently of any consideration recited in the deed (R. 174–175).

by events, that respondent might never obtain the license upon which the capacity to bring water upon the land depended.

Moreover, the value of an interest in land must always be determined by reference to the affirmative use to which that interest may be put. The view that property has value "because it may be used to injure or hinder another enterprise, although itself conferring or securing nothing of value," was rejected, many years ago, as being "so obviously illegitimate as to require no discussion." *Consolidated Gas Co.* v. *City of New York*, 157 Fed. 849, 874 (C.C.S.D.N.Y.). This Court thereafter noted that the "nuisance value" theory discussed in the *Consolidated Gas Company* case had been "excluded from the reckoning with words of trenchant emphasis." *Roberts* v. *New York City*, 295 U.S. 264, 283.

The *Roberts* case is of further interest because it involved a question as to the value to be placed on easements—in that instance, easements to operate on the public streets held by an elevated railroad company. The Court, having found that the company's franchise had become valueless because it had been long operating at a loss, concluded (p. 285) that the easements "had a worth that was merely nominal." In other words, the value of the easements was the value of the right to make an affirmative and profitable use of the property in the manner described by the grant; value was not to be measured by the injury

or deprivation which such use might entail for others.[1]

C. The erroneous view (R. 330) that the fee owner "destroyed the value of the fee," many years ago, by the conveyance of flowage easements to the power company apparently led the court below to believe that, if fee value were not awarded to the power company, the United States would get "something for nothing." The United States is not seeking a windfall. We are seeking, rather, to avoid two possibilities—that of paying the wrong person; that of paying twice. We submit that the fee values are in the fee owner and that the owner has been fairly and properly compensated, to her full satisfaction.

We have pointed out above that the right conveyed by the fee owner to the power company was one which respondent had no immediate capacity to enjoy, that the prospect of enjoyment was never more than remote, that it was at all times conditioned upon the prior grant of a federal license and that the prospect of fulfilling the condition had expired well before the proceeding in condemnation was instituted. In short, to say that a right of use destroys the value of the fee assumes not only that the use will be destructive, but it assumes further that the right can and will be put to prompt effect. The latter assumption is disproved by the facts of this case.

[1] For other cases holding that, where an easement has not proved productive, no damages, or merely nominal damages, are sustained on condemnation, see *Northern Pac. Ry. Co. v. North American Tel. Co.*, 230 Fed. 347, 354–359 (C.A. 8), and cases there cited. Original cost of the easement is not the test, see *United States* v. *Toronto Nav. Co.*, 338 U.S. 376, 403, but, if it were, respondent would be faced with its failure to show what was originally paid for the flowage easements.

We note additionally that the fact that the owner of a fee has already granted an easement to X is not ordinarily regarded as precluding him (at least, in the absence of a specific contractual undertaking to refrain) from granting a similar easement to Y and Z.[8] In all events, X can complain of interference by subsequent grantees of the fee owner only if he establishes that they are in fact impairing his active enjoyment of his right of use.[9] In the instant case, nothing valuable was taken from respondent when the United States obtained an easement from Mrs. Williams because respondent had never been able to exercise its right of use and was plainly in no position to do so in the future.[10]

A corollary of the proposition that respondent's rights had in practical effect expired before the date of condemnation is the proposition that the interest of the fee owner was substantially unimpaired at the

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[8] 3 Powell, *Real Property*, Sec. 417, p. 472; Sec. 420, p. 486; American Law Institute, *Restatement of Property* (1944) Sec. 493, com. d; Note, 133 A.L.R. 1200, 1201; *Pasadena* v. *California-Michigan Land & Water Co.*, 17 Cal. 2d 576, 110 P. 2d 983.

[9] *Harlow* v. *Lake Superior Iron Co.*, 36 Mich. 105, 119–120; *Brookshire Oil Co.* v. *Casmalia Etc. Co.*, 156 Cal. 211, 216–217, 103 Pac. 927, 929; Note, 133 A.L.R. 1200, 1203. See N.Y. Stat. (McKinney, 1959) Real Property Law, Sec. 346, as enacted by N.Y. Laws, 1958, c. 864.

[10] The fact that the power company was joined as a defendant in the condemnation proceeding does not, of course, give rise to an inference that it had an interest of substantial value. It is the Government's regular practice to join all parties who may assert claims of right in relation to the condemned property. Such joinder does not prejudice any claim or defense of the United States. *United States* v. *93,970 Acres*, 360 U.S. 328.

time of the taking and that the full measure of compensation owing was due to her. At most, the outstanding easement of the power company represented a cloud upon the title. To the limited extent that this cloud might have diminished the market value of the fee, the United States is not responsible. Where owners, by their own division of interests in a tract of land, have lessened the value of the whole, the United States is not required to pay more than the market value of the individual interests, even though the aggregate of payments may prove less than the amount which would have been paid if the whole had remained undivided. *Boston Chamber of Commerce* v. *Boston*, 217 U.S. 189, 195; *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 76, 80; *Mayor and City Council of Baltimore* v. *United States*, 147 F. 2d 786, 789 (C.A. 4).

The bite of the decision below would be more apparent if the settlement with the fee owner had involved a payment, say, of $50,000 instead of one dollar. But the only fact of legal significance is that the United States has made a full settlement with the fee owner to the latter's complete satisfaction. See R. 37–38. The fortuitous circumstance that Mrs. Williams desired to convey a flowage easement, rather than a fee, to the United States and that she deemed one dollar adequate monetary consideration because she wished to enjoy the benefits of having an artificial lake upon her estate,[11] cannot enlarge the rights of

[11] The arrangement which the United States made with Mrs. Williams gives her the undoubted advantage of exclusive fee ownership of the shore.

others or confer upon them a right of compensation for more than the legal interests that they themselves possess. *United States* v. *Petty Motor Co.*, 327 U.S. 372, 376; *Messer* v. *United States*, 157 F. 2d 793, 795 (C.A. 5); *Southern California Fisherman's Ass'n* v. *United States*, 174 F. 2d 739, 740 (C.A. 9).

The irrelevance of fee value from the standpoint of the power company's right to compensation is also evident from consideration of the case which would be presented if the Government had proceeded by physical seizure (leaving injured parties to suit under the Tucker Act) rather than by declaration of taking. Certainly, whatever the procedure, the amount of compensation due the affected parties is the same. *Hurley* v. *Kincaid*, 285 U.S. 95, 104; *United States* v. *Dow*, 357 U.S. 13, 21. In a Tucker Act suit by the power company, claims of interference with agricultural or timber uses—uses of which the utility company could not avail itself—would certainly be excluded, for in such a case the burden would be on the company to demonstrate how *it* had been injured by the Government's flooding of the land.[12] The only interference with the *company's* interests would be with prospective flooding for power purposes, and that is precisely the value excluded by this Court's *Twin City* decision. The case here is no different.

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[12] The measure of compensation, of course, is loss to the owner, not gain to the taker. *United States* v. *Twin City Power Co.*, 350 U.S. 222, 228; *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 76, 80; *United States* v. *Miller*, 317 U.S. 369, 375. The owner has the burden of proving that loss. *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 273–274.

II. THERE WAS NO BASIS FOR THE AWARD OF "SEVERANCE DAMAGES."

In *United States* v. *Miller,* 317 U.S. 369, this Court stated the principle of severance damages as follows (p. 376): "If only a portion of a single tract is taken, the owner's compensation for that taking includes any element of value arising out of the relation of the part taken to the entire tract." See also *Bauman* v. *Ross,* 167 U.S. 548, 574; *Cole Investment Co.* v. *United States,* 258 F. 2d 203, 204–205 (C.A. 9). The law thus recognizes that taking part of an area may diminish the value of the part not taken, for example, by making the remainder too small for optimum use. In the case of condemnation of a fee, the total compensation, including severance damage, is determinable by ascertaining the value of what is left after the taking and deducting that amount from the value of the whole before the taking.

In this case, the district court affirmed the report of the commission which allowed $11,720 as "damages to the residue" (R. 102)—damages described by the court of appeals as "severance damages" (R. 336). But there is no tract which remains in the power company's hands after the taking. The court of appeals' decision, in granting compensation other than severance damages, proceeds on the premise that the Government ousted the power company of its easement over 1540 acres, representing the right to flood to an elevation of 321 feet. The court of appeals also held that compensation for the lands between that elevation and contour level 330, the height of the Government's described easement, would be payable to Mrs. Wil-

liams. It thus recognized that the power company's easement was a lesser easement than that acquired by the Government. It follows, we submit, that there is no subsisting or residual interest in the power company damaged by severance. It has suffered no loss.

The court below justified the severance damage award on the theory that the power company, acquiring an easement from Mrs. Williams, would have to pay her severance damage; therefore, it concluded, the United States must pay such damages to the power company. But Mrs. Williams has already been compensated. Her rights are not here involved and they cannot in any event enlarge those of respondent.

It is also settled that there is a right to severance damages only where there is unity of use as between the part taken and the residue. *E.g., Cole Investment Co.* v. *United States,* 258 F. 2d 203, 205 (C.A. 9); *United States* v. *Mills,* 237 F. 2d 401, 404 (C.A. 8); *Baetjer* v. *United States,* 143 F. 2d 391 (C.A. 1), certiorari denied, 323 U.S. 722; *Sharp* v. *United States,* 112 Fed. 893, 896 (C.A. 3), affirmed, 191 U.S. 341. In the instant case the only residue of any kind is the Falkland Estate which "has been used exclusively for the past twenty-five years or more as a conservation project," aiming at the preservation of "timber and the development and propagation of wildlife" (R. 160). Respondent has no interest in that use and has never participated in it.

The right, moreover, is restricted to tracts in one ownership. *United States* v. *Honolulu Plantation Co.,* 182 F. 2d 172, 175–176, 178–179 (C.A. 9), certiorari

denied, 340 U.S. 820;[13] *State* v. *Superior Court for Spokane County*, 10 Wash. 2d 362, 371, 116 P. 2d 752, 756; *McIntyre* v. *Board of County Comm'rs*, 168 Kan. 115, 118–121, 211 P. 2d 59, 63–64; *Conness* v. *Indiana, I. & I. R. Co.*, 193 Ill. 464, 470–471, 62 N.E. 221, 223; *Glendenning* v. *Stahley*, 173 Ind. 674, 683–684, 91 N.E. 234, 238; *Tillman* v. *Lewisberg & N. R. Co.*, 133 Tenn. 554, 182 S.W. 597; *Duggan* v. *State*, 214 Iowa 230, 233, 242 N.W. 98, 99. As shown by these cases, different interests, even when held by husband and wife, brother and sister, or parent and child, will not support a recovery of severance damages."[14]

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[13] The *Honolulu Plantation* case also expresses the view that the severance damage rule is applicable only "to condemnation of fee simple title of a tract * * *" (182 F. 2d at 175–176).

[14] Apart from the fact that the claim which respondent prosecuted covered but 1540 acres of a 7400-acre estate (R. 26, 28, 30–32, 53, 57, 70, 72, 75–77, 78, 330), it appears that substantial acreage embraced in the Government's taking was acquired by the Falkland Estate subsequent to any rights conveyed to the respondent (R. 160). Respondent could not on any theory be entitled to severance damages with respect to that acreage.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 49

In the

Supreme Court of the United States

October Term 1960

UNITED STATES OF AMERICA,
Petitioner

v.

VIRGINIA ELECTRIC AND POWER COMPANY,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AND APPENDIX FOR THE RESPONDENT

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October, 1960

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BRIEF FOR THE RESPONDENT*

OPINIONS BELOW

The district court did not write an opinion but the reasons for its holding are stated in its judgment-order. (R. 143-150). The four opinions by the court of appeals are adequately referred to in petitioner's brief. (P. Br. 4).

* All emphasis in this brief has been added unless otherwise indicated. Reference to the Appendix to this brief is shown as "App. p. ."

JURISDICTION

The jurisdictional requisites are adequately set forth in petitioner's brief. (P. Br. 1-2).

QUESTIONS PRESENTED

Respondent cannot accept petitioner's statement of the questions presented (P. Br. 3) because they are not "expressed in the terms and circumstances of the case."[1] Therefore, respondent is obliged to first summarize the case before stating the questions presented to the Court in this case.

This was an *in rem* condemnation proceeding in which the United States acquired a perpetual easement to flood permanently and intermittently fast land riparian to a navigable stream. The only questions in the district court were (1) the amount of just compensation for the Government's taking of an easement to flood 1840 acres of a 7400 acre tract, and (2) the allocation of such compensation between the owner of the underlying fee and respondent which owned a perpetual and exclusive easement to flood permanently 1540 of the acres included in the Government's taking.

Prior to institution of the *in rem* action, the owner of the underlying fee, Mrs. Olive Vaughan Williams, agreed with the United States in an option contract, expressly subject to all of respondent's rights in the entire 7400 acre tract to accept $1.00 for the additional servitude imposed by the government upon the tract. Mrs. Williams understood, and the Government represented, it would acquire respondent's rights separately. But the Government obtained no conveyance from Mrs. Williams pursuant to this option and elected instead to acquire its flowage easement by exercising its power of eminent domain against the land itself.

[1] U. S. Sup. Ct. R. 40(1)(d)(1). They are hypothetical and not supported by a fair and impartial consideration of the entire record.

The commissioners filed a unanimous report that, after excluding any element of value arising from the availability of the land for water power purposes, $70,920 was the difference between the fair market value of the 7400 acre tract before and after the imposition of the Government's flowage easement. The Government objected to this determination on the theory that only respondent's easement to flood should be valued and it had no value as a matter of law. The commissioners' report was confirmed and adopted by the district court. The district court proceeded to allocate the award and determined that for the extinguishment of its easement to flood respondent should receive $65,520 as its share of the compensation for the taking of the Government's flowage easement.

Mrs. Williams made no claim to any portion of the compensation allocable to her for the added servitude imposed upon the land, and she did not contest either respondent's right to be paid or the amount of its share of such compensation.

The evidence offered by the United States was directed only to respondent's share of the compensation. On the basis of its negotiations with Mrs. Williams and the option contract, the Government claimed that it had made full and complete settlement for all damages to the residue and, therefore, in determining the amount to be paid respondent for its easement to flood a portion of the 7400 acre tract, the district court should exclude any element of compensation based on damage to the residue. The respondent offered evidence in rebuttal and the district court rejected petitioner's contention.

The court of appeals affirmed the district court.

Thus, the only questions which can now be presented to this Court in this case are:

1. Whether the Government is entitled to acquire in an *in rem* condemnation proceeding a flowage easement over land riparian to a navigable stream without making compensation to the owner of a perpetual and exclusive easement to flood the same land, who had already compensated the fee owner therefor, and if so,

2. Whether the United States in an *in rem* condemnation proceeding has standing to question the allocation of compensation for the Government's flowage easement between the owners of various interests in the property taken.

3. And, if this Court answers the second question in the affirmative, whether the district court's allocation to respondent for its property interest was proper.

While petitioner's statement of the questions presented (P. Br. 3) seemingly relates only to respondent's third question, petitioner's argument shows that the Government's position here is that, as a matter of law, there can be no basis for valuing an easement to flood land riparian to a navigable stream when that easement is extinguished by the Government's condemnation of a flowage easement over the same land. Carried to its logical conclusion the Government's argument would permit it to acquire an easement to flood land without paying anyone.

Respondent submits that its restatement of the questions presented provides a more orderly basis for consideration of the issues.

STATEMENT OF THE CASE

The Government's arguments for reversal are not justified by a consideration of the entire record. In fairness to the courts whose decisions are challenged and to respondent's position throughout this extended litigation, a restatement of the case must be made.

This case involves the acquisition by the United States under a declaration of taking filed October 23, 1952, and the deposit of estimated compensation of $1.00, of a perpetual easement on land lying between the banks of the Dan and Banister Rivers and contour 330', an area of approximately 1840 acres[2] of a 7400 acre tract, known as the "Falkland Estate" to "overflow, permanently or intermittently, as may be necessary for the construction, maintenance and operation of the John H. Kerr Dam and Reservoir" (R. 8-14).

On the date of taking Mrs. Williams owned the fee subject to respondent's riparian and other rights in the "entire" 7400 acre Falkland Estate, including a perpetual and exclusive easement to flood *permanently* up to contour 321', an area of approximately 1540 acres (R. 67 at 68-70).[3] The 300 acres lying between contours 321' and 330' are on the face of the "bluffs" (R. 302).

The sketch on the next page based on a contour map introduced as Government's Exhibit No. 2 (R. 236) shows graphically the extent and location of these easements.

The Government's statement that "the *rights embraced* by respondent's easements" (P. Br. 14) are the water

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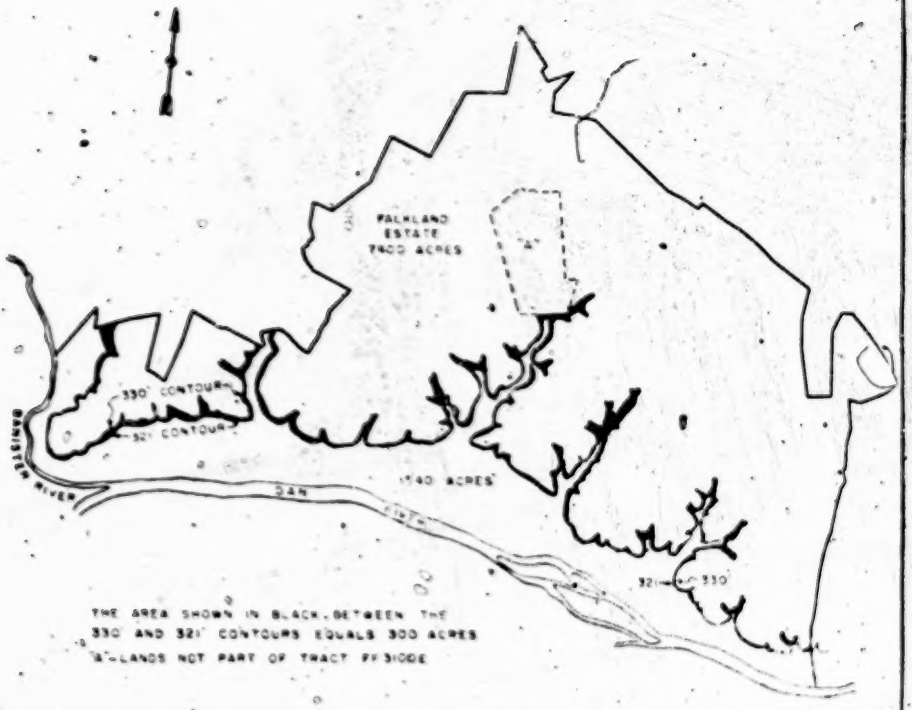
[2] Often referred to in the record as "Tract FF-3100E".

[3] Stipulation of facts paras. 7, 8, 9, and 11 (R. 68-70). Compare plaintiff's motion for pretrial conference (R. 206-214, esp. at 211) and respondent's answer to plaintiff's motion for judgment (R. 196 at 198) and amended answer (R. 15-16). The foregoing references show that the parties' respective versions of the rights owned by the respondent in the entire Falkland Estate were unacceptable each to the other and, therefore, the stipulation (R. 67 at 68) referred to the basic deed of October 14, 1925 (Def. Exh. C, *infra*), as corrected by the deed of January 3, 1942 (Def. Exh. D, *infra*) for a description of respondent's rights.

Petitioner's statement that "substantial acreage embraced in the Government's taking was acquired by the Falkland Estate subsequent to any rights conveyed to the respondent (R. 160)," (P. Br. 25, n. 14), is contrary to the stipulation of facts, was refuted in the cross-examination of the Government's project manager (R. 296-299) and was not deemed worth noticing by the court of appeals.



rights and privileges mentioned in paragraph 8 of the stipulation (P. Br. 6 and 14) is wrong. Paragraph 8, which the Government insisted on including in the stipulation[1] refers *only* to water rights and privileges. This case involves respondent's perpetual and exclusive easement to flood permanently 1,540 acres of the 7400 acre tract. This easement is not mentioned or even referred to in paragraph 8 of the stipulation. It is covered instead by paragraphs 7, 9, 10, 11, and 12 in the stipulation (R. 67 at 68-70). Paragraph 9 refers to the deed of October 14, 1925, from Falkland Estate, Incorporated, to Middle Virginia Power Company (Def. Exh. C, R. 172) as corrected by the deed of January 3, 1942, from Hannah N. Vaughan (Def. Exh. D,

[1] Compare Plaintiff's Interrogatory 1 (R. 16), Defendant's Answer (1) (R. 20-21).

R. 177) for a description of respondent's rights which included the easement to flood involved in this case. By this general warranty deed[5] with express covenants for title, Mrs. Williams' predecessor in title granted to respondent's predecessor in title, *inter alia*, "the following property rights, privileges and immunities, namely:

* * *

"SECOND: The right to build . . . any dam or dams the . . . Company may desire, across the Dan River, at any point or points, it may desire . . . so that the normal water level[6] behind said dam, or dams shall not be higher than the extreme height to which said . . . Company has the right to elevate the waters of the Dan River, in the aforesaid deed from Halifax . . . unto the said . . . Company; *together with all* riparian rights, water rights, *easements*, and *rights of floodage*, to the fullest extent of said maximum normal water level, as hereinabove provided, *so far as said maximum normal water level concerns or affects, or may hereafter concern or affect, the present property of Falkland Estate, Incorporated*. . . . [up to contour 321' an area of 1540 acres"] which present property so to be affected consists of approximately 6100 [7400"] acres . . . also:

"THIRD[8]: . . . .

"FOURTH: Falkland Estate, Incorporated, doth here-

[5]The three deeds referred to therein, two dated May 1, 1907, and one dated January 18, 1920 (Def. Exhs. E, F and G; R. 180, 184; 187) were the source of title to only a small portion (390 acres) of the 7400 acres that were involved in the deed of October 14, 1925.

[6]Stipulation, R. 67 at 69-70, paras. 10 and 11.

[7]Ibid. at R. 68-69, para. 7.

[8]This paragraph relates to rights to abut dams and build powerhouses on the Falkland tract with rights of ingress and egress. It also provides for the acquisition of rights of way for transmission lines and land for dwellings and outbuildings at the rate of $20 an acre. This is referred to in petitioner's brief, p. 17, n. 6, but it is not material to this case.

by covenant, to run with the land, that it doth hereby grant and release . . . all claims for damages . . . to the residue of the real estate . . . as the result of the flooding of any of the present land of the said Falkland Estate. . . .

"FIFTH . . . .

"SIXTH: It is further covenanted and agreed that *the provisions of this deed are* hereby *covenants running with the land, and binding upon the parties hereto, their successors or assigns.*"

In the option contract, prepared by the Government,[10] dated April 30, 1951 (Pl. Exh. 1, R. 58) Mrs. Williams agreed that (R. 63):

"Subject to such water, flowage, riparian and other rights, if any, which the Virginia Electric and Power Company has in or on the above described lands. For a more particular description of said rights, reference is herein made to a deed from Falkland Estate, Incorporated, to Hannah N. Vaughan, dated October 20, 1920, . . . a deed from Hannah N. Vaughan to Middle Virginia Power Company, dated January 3, 1942 . . . a deed from Middle Virginia Power Company to Virginia Public Service Company, dated June 8, 1942 . . . and agreement of merger of Virginia Public Service Company with Virginia Electric and Power Company and order of transfer of property entered May 26, 1944. . . ."

the Government could acquire the right to flood the Falkland

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[9] By this paragraph the fee owner retained rights of ingress and egress to and from the waters of the Dan River and the right to use the water for ordinary domestic purposes, bathing, boating and fishing. The evidence indicates that Mrs. Williams wished to retain similar rights when the Government was negotiating with her to obtain the right to flood the land above contour 321', the upper limit of respondent's flowage easement.

[10] See Def. Exh. H, R. 313 at 318, 319-320, 321.

tract up to contour 330′ for the sum of $1.00. The evidence showed that the "basic reason" for Mrs. Williams' agreement to accept this nominal compensation for the added servitude imposed by the Government's flowage easement[11] was her understanding that the Government would acquire the right to flood the land up to contour 321′ from respondent and that she considered the Government's infrequent flooding of the additional land on the bluffs between contours 321′ and 330′ "a comparatively small thing" (R. 301-302).[12] On several occasions before the option was given it was represented that the United States would acquire from the respondent its rights in the Falkland tract (Def. Exh. H, R. 313-323, 295; 296; Def. Exh. I, R. 324-325; 302).

There is no factual basis for the Government's statement that: "The United States initially proposed to condemn

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[11] See R. 34, 50, 56, 57; 291-294; 321-322; Pl. Exh. 3, R. 159-161, esp. at 160-161; also Def. Exh. H, *supra*, at R. 316, 321 and 322. The Government's first brief in the court of appeals stated (at p. 9): "... the option agreement between the Government and the fee owner ... was made subject to the water rights of Vepco ..." and on page 30 thereof: "*The Government ... took from [the fee owner] and paid her only for the increased servitude, if any, imposed by this new flowage easement.*" The Government's petition to this Court, No. 41, O. T. 1956, said: "The fee owner ... agreed to convey to the Government *any flowage rights she may have retained*, for the consideration of one dollar (R. 71-82, App., 29)." (R. 226).

[12] Thus there is no factual basis for the Government's repeated statement that it was a "fortuitous circumstance that [the fee owner] Mrs. Williams desired to convey a flowage easement, rather than a fee, to the United States and that she deemed one dollar adequate monetary consideration because she wished to enjoy the benefits of having an artificial lake upon her estate" (Pet. Br. pp. 12 and 21). When the matter of benefits was submitted to the commissioners, the Government made no such claim, the evidence showed that there was no lake—only mud and marsh (Munger, R. 265-267) and the commissioners reported that based on the evidence and their personal observation the damages to the residue exceeded any special benefits (R. 99 at 100-101).

the fee title of this particular tract . . ." (P. Br. 5, see also 12 and 21). The Government's Project Manager, Buford, testified that in April 1950 the United States "had not definitely determined" to condemn the fee simple interest in the Falkland tract (R. 293) and the United States had not then determined "to ask for a fee simple interest" because the Corps of Engineers "had not investigated the Falkland tract". (R. 294, see also Def. Exhs. H and I, *supra*).[13]

Although the Government exercised its option (R. 97), the fee owner made no conveyance to the Government, and the United States elected to acquire its flowage easement by condemnation. At the outset, the Government conceded that it "acquired nothing" under the option agreement (R. 34, see Government's answer to respondent's interrogatory 6, R. 201 at 202, 203 at 204-205).

The Government's declaration of taking (R. 8), under which its flowage easement was acquired, was filed on October 23, 1952, under the style *United States of America v. 2079.72 Acres of Land, more or less, in the County of*

[13] The evidence further showed that, after the fee owner's offer was brought to the attention of the Corps of Engineers, it was estimated that the "fee value for the 1810 (sic) acres", which was then considered all the Government required, was at least $161,000 or $180,000. The Government's motive as stated by the Corps of Engineers was, "In view of the very substantial savings involved, it was considered to the best interest of the Government to accept the fee owner's offer [. . . to convey a comprehensive flowage easement . . . for $1.00 subject only to outstanding interest of the Power Company" (Def. Exh. H, *supra*, R. 313 at 316). In its first brief in the court of appeals dated September 1954, the Government explained that the practice of taking an easement rather than the fee was "not of recent origin" (p. 22) and that it was ". . . the policy of the Government to condemn only the minimum interest which it needs to accomplish its purpose and leave to the landowner as much of his property as possible. . . ." (pp. 25-26).

Halifax, Virginia, Olive Vaughan Williams, et al., and Unknown Owners. On the same day, the Government filed its complaint, under the same style, "for the taking of property under the power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest" (R. 1), describing the nature and purposes of the flowage easement taken by the Government (R. 4) and the land directly involved (R. 4-8).[11] Neither the declaration of taking nor the complaint nor the exhibits attached stated that the Government's flowage easement would be subject to respondent's rights in the Falkland Estate or that respondent's easement to flood most of the same land was excluded from the proceeding. In fact, respondent's rights were not mentioned and the Government deleted respondent's name from the complaint's list of owners and possible parties defendant "having or claiming, or who may have or claim an interest in the property" (R. 190).

However, in its complaint the Government recognized that there might be "others who would have or claim some *interest* in the property to be taken" and they were "made parties to this action under the designation 'Unknown Owners'" (R. 2; cf. R. 190). The Government served notice on respondent that the complaint had been filed, stating that "at the trial of the *issue of just compensation* . . . [respondent] may present evidence as to *the amount of compensation* to be paid *for the property in which [respondent had] any interest and* [that respondent] may share in the *distribution* of the award of compensation" (R. 191-192; cf. R. 194). Respondent filed notice of appearance claiming an interest

[11] Many other tracts lying in the 41 and 81 segments of the project were also included. Those matters were later settled and are not now involved.

in the Falkland tract and reserving the "right to contest the issue of just compensation" for the Government's easement thereon "and to appear and present evidence of value of [such property] and of [respondent's] interests therein at the trial of such issue. . . ." (R. 193).

At the first pretrial conference, respondent disavowed intention of claiming any element of value "based upon an integrated power property" (R. 41-42).[9] At the first trial respondent reaffirmed that it was making no claim based upon water power value or rights (R. 39, 54).[10] By agreement of the parties the district court heard the evidence. The uncontradicted testimony was (1) that in 1941 an engineering study had been made indicating a substantial economic value for respondent's flowage easement and other rights in the Falkland tract and other properties,[10] (2) that prior to the Government's construction of the Kerr Dam and Reservoir, respondent's "perpetual right to flood this area . . . [had] value because of the demand for same . . . for hydroelectric purposes . . . for industrial development in the paper or chemical industries . . . [and for] area developments" (R. 44-45); and (3) that as of the date of taking the "minimum fair market value" of respondent's easement to flood permanently was "not less than the appraised value of

[9] Respondent took this position prior to *Twin City Power Co.* v. *United States*, 215 F. 2d 592 (4th Cir. August 30, 1954), which was reversed by this Court on January 23, 1956, 350 U. S. 222, because the respondent did not consider that, absent an integrated power site, it should assert any measure of value that would include water power value. But it does not follow, as petitioner's brief implies, that respondent's flowage easement had no value because respondent had "never assembled the lands necessary for an integrated dam site" (P. Br. 16, cf. 10).

[10] This study indicated a water power value of approximately $300,000, but respondent expressly stated that such value should not be considered (R. 39) and the engineering report was excluded upon the Government's objection (R. 40).

the land being flooded" (R. 42-43).[17] The foregoing amply supports the district court's statement: "I do not think there is any question that the [respondent's] rights had value. . . ." (R. 40).

The Government has never offered evidence indicating the contrary. Respondent submits that petitioner was in no position to challenge this because House Document No. 650, 78th Cong., 2d Sess., on the basis of which Congress approved the general plan for the comprehensive development of the Roanoke River Basin, including the Dan River (P. Br. 4), shows that in 1943 there were 18 privately owned reservoirs in the Roanoke River Basin used for various purposes, including condensing water for steam plants, processing water for industrial developments, water storage, recreation, and hydro-electric power.[18] House Document 650 recommended construction of 11 new projects, including one on the Dan River, and discussed others. One conclusion stated therein was (p. 58):

"It will thus be noted that the large electric utility

[17] At the outset, the Government, the respondent and the district court agreed that the original cost of respondent's flowage easement was not a proper consideration (R. 35-37, 284; but cf. 304-306). However, at the hearing on November 24, 1958, the Government reversed its position and urged that this "might . . . be considered 'one' test; 'one' admissible item" (R. 304). The United States documentary stamps affixed to the deed of October 14, 1925, conveying riparian and other rights in the Falkland tract and other small tracts immediately across the Dan River, including this flowage easement, to respondent's predecessor in title for the consideration of 9,500 shares of stock of Middle Virginia Power Company, indicate a consideration or value of approximately $65,000 (Def. Exh. C, R. 172 at 176). Although petitioner's brief recognizes that "the original cost of the easement is not the test", it insinuates that respondent was derelict because "if it were, the respondent would be faced with its failure to show what was originally paid for the flowage easements" (P. Br. 19, n. 7).

[18] See Table 8 of Review Report on Roanoke River, Va., and N. C., January 30, 1943, House Document 650 at page 19.

companies in this region have shown definite interest in the development of the potential water power resources of the basin. The construction of hydroelectric projects at the better sites in the basin was undoubtedly delayed by private interests because of the depression of 1929-1936."[19]

Thus, there is no factual basis for the Government's statements: ". . . the limited prospect that the easement might some day prove productive had terminated well in advance of the condemnation proceedings" (P. Br. 10) and ". . . respondent's rights were not . . . valuable and had in practical effect expired before the date of condemnation. . . ." (P. Br. 12).

Based on uncontradicted expert testimony that the fee simple value of the 1540 acres valued as a separate tract, *standing alone*, and with all merchantable timber removed was $40 or $45 an acre (Harvie, $40, R. 30-31; Clark, $45, R. 26-28), the district court, upon the theory that the value of respondent's easement to flood permanently 1540 acres was not less than the fee value of the land which would be flooded (R. 43, 48-49), adopted the lower valuation and entered judgment for $61,600[20] (R. 23-57; 72-74; 220-225).

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[19] See, e. g., *Chapman, U. S. ex rel. v. F. P. C.*, 345 U. S. 153 (1953).

[20] On this basis the Government was not required to pay the full fee value of the 1540 acres as a part of the Falkland tract, for both of respondent's appraisers testified on cross-examination that if they had appraised that land as a part of the 7400 acre Falkland tract the fee value would have been "substantially more" or "much greater" (R. 28-30; 31-32). This was borne out at the second trial when the value of the entire 7400 acre tract, including the areas that were subject to the Government's and respondent's respective easements was the issue (R. 104-138; 244-268). There is, therefore, no justification for the Government's comparison of the results of the first and second trial (P. Br. 8), which, respondent submits, gives the erroneous impression that the second award, now under review, which was determined upon an entirely different basis from the first was "equated with" or "equivalent to [the] fee value" of the servient land (see P. Br. 9, 11, 12, 16, 19 and 22).

Upon the appeal which followed, the court of appeals in a decision by Chief Judge Parker denied the Government's contention that respondent's easement to flood had no value upon the authority of its decision in *Twin City Power Co.* v. *United States*, 215 F. 2d 592 (4th Cir. 1954). The court also rejected *the Government's contention* that in any event the Government was not liable for the fee simple value of the land, *but only for the difference in value of the servient land before and after the taking of the Government's easement*. 218 F. 2d 524, 525, (R. 76); see also 370 F. 2d 707, 709; (R. 330-331; and R. 55).[1]

Upon remand by this Court for further consideration in the light of *United States* v. *Twin City Power Co.*, 350 U. S. 222 (350 U. S. 950), the court of appeals held, in an opinion by Chief Judge Parker, that respondent's right to compensation was not foreclosed by the *Twin City* decision. 235 F. 2d 327, 329, (R. 79-80). But agreeing with the Government's contention, at that time, that compensation should be determined on the basis of the Government's flowage easement, which would flood a part of the land only intermittently and therefore, *"would not destroy the entire value of the land for agricultural or grazing purposes"*, 235 F. 2d 327, 330, (R. 81), the court of appeals remanded the case to the district court for further proceedings. The Government filed a petition for rehearing in which it reversed its position and urged that *only* respondent's ease-

[1] Then the Government contended that only its easement should be valued because it would cause less damage than respondent's since the Government would flood the land intermittently and portions thereof, infrequently; also that there would be special benefits to the remainder (R. 55; compare the Government's counsel's hypothetical questions on cross-examination, R. 29-30 and 31-32). The Government now takes the opposite position. (U. Br. 17, n. 5).

ment should be valued since, according to the Government, it had made settlement with the fee owner. The court of appeals rejected these arguments because this was an *in rem* proceeding 237 F. 2d 160, (R. 82-83).

Upon remand the district court proceeded with the determination of compensation in accordance with the mandate from the court of appeals (R. 229-233 and 83). Commissioners were appointed and directed to find and report the difference between the fair market value of the 7400 acre tract before and after the imposition of the Government's easement described in the Government's complaint (Exhs. B and A, respectively, order appointing commissioners, R. 86, 88-89; Exh. B, R. 235; Exh. A, R. 231; see Exh. D to complaint, R. 1 at 4-6, and Exh. C, R. 4; and Schedule A and paragraph 3 (b) of the declaration of taking, R. 8 at 10-14 and 9-10) as follows (R. 235):

> The full, complete and perpetual right, power and privilege to overflow *permanently* or *intermittently*, as may be necessary as a result of the construction, maintenance and operation of the John H. Kerr Dam and Reservoir, Tract No. FF-3100E, Pars. A, B, C, D, E and F, together with the right, power and privilege to go upon the lands involved from time to time as the occasion may require to accomplish any activities in connection with the maintenance and operation of the John H. Kerr Dam and Reservoir and to remove from said lands natural or artificial structures or obstructions which, in the opinion of the representatives of the United States in charge, may be detrimental to the maintenance and operation of said project, reserving, however, to the owner(s) and their assigns, all such rights and privileges as may be used and enjoyed without interfering with or abridging the rights and easements acquired by the United States, subject, however,

to existing easements for public roads and highways, for public utilities, for railroads and for pipelines."

The Commissioners were required to take into consideration the resulting benefits, if any (R. 89).[1] Twice the district court admonished the commissioners to "exclude from their valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream" (R. 90, also R. 86 at 88-89). The commissioners were also instructed not to include the value of any timber on the 1840 acres subject

[1] The Government now insists, for the first time that this easement is more burdensome than respondent's easement to flood because the former "was for the much broader purpose of a 'flood control project and other purposes incident thereto' (R. 3, 9) *including 'substantial benefit to navigation'* " (P. Br. 17, n. 5). This is contrary to the Government's previous position (1) at the first trial in connection with the district court's refusal of the Government's offer of proof concerning frequency and extent of flooding, which did not mention navigation and made no attempt to distinguish between flooding for flood control and flooding for navigation (R. 49-50) and (2) before the court of appeals (*see supra*, p. 11, n. 2), and 218 F. 2d 524-525; R. 75 at 76; and 270 F. 2d 707-709; R. 329 at 330-331). The foregoing description of the Government's flowage easement, which is the same as that stated in its declaration of taking and petition makes no such distinction.

As to the Government's alleged "substantial benefit to navigation" (P. Br. 17, n. 5), it appears from the report of the Chief of Engineers in House Document 650, 78th Cong., 2d Sess., that no value was assigned for benefits from navigation and the plan for the project envisioned only "aid in the future extension of the existing navigation project to Weldon, N. C. should such extension be found to be warranted in the future" (pp. 79 and 88).

[1] 33 U.S.C. § 595, which is applicable here by reasons of the provisions of 33 U.S.C. §§ 591 and 701c-2 (R. 3, 9), requires that the tribunal determining the "compensation or assessing the damages to the owner, whether for the value of the part taken or for any injury to the part not taken shall take into consideration by way of reducing the amount of compensation or damages any special or direct benefits arising from the improvement. . . ."

to the Government's flowage easement.[4] The district court propounded four inquiries to the commissioners. The first stated the issue of compensation as stated in the pleadings, without regard to respondent's easement. The second inquiry took into consideration the fact that respondent's easement would flood the same land as the Government's only up to contour 321'. The third and fourth inquiries, proposed by the Government (R. 85-86), restricted the commissioners to a consideration of only the 1840 acres to be flooded by the Government, without regard to the remainder of the 7400 acre tract.

At the hearings before the commissioners, the Government offered no evidence of value, the frequency of extent of flooding, or the resulting benefits it previously asserted.

Respondent's appraisers testified that the highest and best use of the land was for agricultural, grazing and timber purposes. These witnesses did not agree in their valuations or in their estimates of the *difference* in value before and after the taking of the Government's flowage easement. The depreciation assigned by the experts did not equal the fee values except the land (890 acres) which the evidence showed, and the Government conceded, would be totally destroyed.[5] The commissioner's findings were substantially less than had been assigned by the witnesses. Thus, there is no basis for the Government's statements that the commissioners' determination of compensation or the amount there-

[4] With the consent of the Government, the fee owner had sold this timber and it had been cut and removed. Its value was not considered in any of the valuations made in this case (R. 26-28, 30-31; 90, 101 and 138). Thus, there is no basis for the innuendo in petitioners's brief p. 17, n. 6 that respondent was paid nothing for the timber on the Fall land tract.

[5] A condensed table showing the experts' value and depreciation and the commissioners' findings is printed in App. p. 1. Note that valuations were less than 100% of the fee for all land above Contour 302'.

of allocated by the district court to respondent was "*equivalent* to fee value" or can be "*equated* . . . with the value of the servient fee." (P. Br. 9, 16, 19 and 22).

The commissioners filed a unanimous report answering the district court's four inquiries in the manner required by its order and instructions. In addition, at petitioner's request, they reported the amount of damage to the residue included in their findings (R. 101-102, 104). The commissioners found that the residue had been damaged "beyond any peculiar benefits that might accrue to such property from the acquisition of the easement by the United States and converting it to its uses" (R. 100-101). Excluding any element of value arising from the availability of the land for water power purposes, the commissioners determined that $70,920 was the just compensation for the Government's flowage easement over 1840 acres of the 7400 acre tract (R. 101).

The Government filed no objection to the commissioners' report as required by Fed. R. Civ. P. 53(e)(2) but later filed a motion to exclude from "any award of just compensation to the defendants (sic) herein any element of compensation based on damages to the residue of the land involved" (R. 139-140), on the theory that the Government had settled for such damages with the fee owners. The district court permitted the Government to introduce the evidence it had proffered (R. 141) regarding its negotiations with the fee owners, and respondent introduced additional evidence on this subject. (R. 141-142, Pl. Exhs. 1 through 7, R. 158-165, 312, 290-291, and 298; R. 292-307 and Def. Exh. H, R. 313, 324 and Def. Exh. I, R. 324-325).[5] Mrs. Wil-

[5] At the first trial on January 18, 1954, the district court sustained the Government's objection that any such evidence was immaterial (R. 32-35, 55; see also Government's answers to respondent's Interrogatory 6, R. 201 at 202; 203 at 204-205).

liams' attorney, who handled all her negotiations with the Government, testified that Mrs. Williams intended to agree to convey to the Government only the additional flowage rights about contour 321' and that because of her option contract with the Government she was not claiming any portion of the compensation for the Government's flowage easement.[7] Whereupon, the district court overruled the Government's motion, holding that when respondent's predecessor in title acquired its flowage easement over 1540 acres of the 7400 acre tract it had made compensation for the resulting damages to the residue, which were expressly included in the grant (see Def. Exh. C, R. 172-176 at 176), and, respondent's share of the compensation for the Government's taking should reflect this damage (R. 148-149). The Government made no claim in the district court that respondent was being compensated for grazing and agricultural rights which it did not have. The Government did not attempt to claim that by virtue of the option agreement or its release clause, it stood in Mrs. Williams' shoes and could assert her rights to challenge the court's allocation to respondent. The district court determined that the value of respondent's interest was the difference, as found in response to the second inquiry, between the fair market value of the 7400 acre tract before and after the imposition of the Government's easement on the 1540 acres included in respondent's easement and, accordingly, entered judgment for $65,520, of which sum $11,720 represented the damage to the residue of the tract (R. 143-150, esp. 149).

Mrs. Williams made no claim to any part of the compensation for the added servitude imposed upon the land, and she

[7] Mrs. Williams took the same position at the first trial (R. 37).

did not contest either respondent's right to be paid or the amount of its share of such compensation.[28]

On the Government's second appeal the court of appeals affirmed. In an opinion by Judge Soper, the court emphatically rejected the Government's contention that respondent had received compensation on the theory that it possessed the right to use the land for agricultural, grazing or forestry purposes and held that the market value of respondent's easement included damages to the residue. 270 F. 2d 707, (R. 329-338).

SUMMARY OF ARGUMENT

1. Respondent's perpetual and exclusive easement to flood riparian land was a property interest for which respondent is entitled to compensation when it is extinguished by eminent domain proceedings in which the United States acquires an easement to flood the same land. This property interest is not a water right and should be distinguished from riparian water rights

[28] The Government's brief would indicate that the settlement with the fee owner was an accomplished fact. That is misleading because as yet no order has been entered for the payment to the fee owner of the agreed consideration of $1.00 for her interest, although the Government's attorney prepared a sketch thereof (R. 285). It should also be noted that the flowage easement in the option contract with Mrs. Williams was more limited than the easement taken by the Government in that the former did not include the words "permanently or intermittently." Compare Plf. Exh. 1, at 58. Thereafter Mrs. Williams and the United States entered into a stipulation limiting the interest taken to the exact language in the option contract (See R. 204). The stipulation did not, of course, have any effect upon the subsequent proceedings because the filing of the declaration of taking irrevocably committed the United States to payment of the ultimate award on that basis. *See United States* v. *Sunset Cemetery Co.*, 132 F. 2d 163 at 164-165 (7th Cir. 1943); *United States* v. *Carey*, 143 F. 2d 445, 450 (9th Cir. 1944); *Sanchez* v. *Crichton*, 147 F. 2d 430, 435 (5th Cir. 1945); *United States* v. *0.71 Acres of Land, etc.*, 148 F. 2d 618, 620 (5th Cir. 1945); also Rule 70A(i)(3) Fed. R. Civ. P.

which are subordinate to the rights of the Government. The existence and value of such an easement was not contingent upon the use of the water in the stream or a license to build a dam. Compensation for this property, excluding any element of value arising from the availability of the land for water power purposes, has not been foreclosed by *United States* v. *Twin City Power Co.*, 350 U. S. 222 (1956), *United States* v. *Chandler Dunbar Co.*, 229 U. S. 53 (1913) or *United States* v. *Grand Dam Authority*, 363 U. S. 229 (1960). The Government's argument that such property interest is not compensable in a taking by the United States because of the Government's paramount navigation servitude is an improper extension of the foregoing decisions and is contrary to *Pumpelly* v. *Green Bay & M Canal Co.*, 13 Wall. 166 (1872), *United States* v. *Cress*, 246 U. S. 316 (1917), and *United States* v. *Kansas City Life Ins. Co.*, 339 U. S. 798 (1950). If the Government's contentions were followed to their logical conclusion the Government would get something for nothing.

2. In an *in rem* proceeding the Government acquires a new title against all the world and compensation for the *res* taken is determined without regard to the various ownerships or interests in the servient land. The *res* valued is the Government's flowage easement and the measure of compensation therefor is the difference in value of the servient land before and after the taking of that easement, excluding any element of value arising from the availability of the land for water power purposes. Compensation for the Government's flowage easement was determined in unassailable fashion.

3. After the compensation for the *res* taken has been fairly determined, the condemnor has no standing in further

proceedings in the district court for the distribution of this compensation between the owners of various interests or estates in the land. But if it did, in the instant case the district court correctly determined the share of the compensation for the Government's easement which should be paid to respondent for the extinguishment of its flowage easement by the Government's taking.

ARGUMENT

Introduction

Although the petitioner avoids saying so categorically, the implications of the arguments in petitioner's opening brief are that respondent had nothing of value as far as the United States was concerned and, therefore, was not entitled to any compensation. Respondent's position is that it owned a valuable property interest for which it was properly compensated in an *in rem* condemnation proceeding by the United States. Thus, the contentions of the parties boil down to a consideration of what respondent owned and what, if anything, should be paid when its interest was extinguished by eminent domain proceedings by the United States. As Judge Sofer has pointed out, what the Government is really trying to do in this case is to get something for nothing.

I.

Respondent Was Entitled to Compensation for Its Easement to Flood

It is clear from the foregoing statement of the case that on the date of the taking respondent owned, *inter alia*, a perpetual and exclusive easement to flood permanently 1540

acres of the 7400 acre Falkland tract, without further payment for damages to the area flooded or to the residue of such land.[29] The evidence shows that this property interest, which had been obtained by express grant, had not been extinguished by non user.[30] Respondent's easement to flood was not a water right.[31] It was a transferable, commercial easement in gross with inherent value.[32]

The value of an easement is not diminished by the owner's inability to exercise it. *See Boom Company v. Patterson*, 98

[29] Stipulation of facts, R. 67-70, 166; Exh. 3, R. 172-176; *see* 3 POWELL, REAL PROPERTY, § 405 (1952); RESTATEMENT, PROPERTY, § 486.

[30] *Lindsey v. Clark*, 193 Va. 822, 525, 70 S. E. 2d 342, 344 (1952); driveway); *Norfolk & Western Ry. Co. v. Peckham*, 107 Va. 500, 509, 59 S. E. 404, 407 (1907) (right of way for water race); 3 POWELL, REAL PROPERTY, § 423, n. 20 (1952).

[31] "The recognition of the important differences between those law-created relationships [water rights and other 'natural rights'] and prescriptive easements reaches back to the time of Bracton [fol. IV, f. 221a, . . .]" 3 POWELL, REAL PROPERTY, § 404 n. 8 (1952).

[32] Easements in gross and appurtenant by definition, both have servient tenements, but with the easement in gross the servitude imposed runs in favor of a specific legal person, rather than the parties in possession of the dominant tenement. E.g., *Stokes Orchard v. Manley*, 194 Va. 339, 344, 73 S. E. 2d 390, 393 (1952). By statute in Virginia, an easement in gross is an "interest in land" conveyable by deed or will. Va. Code Ann. § 55-6 (Repl. Vol. 1950); *Richmond v. Richmond Sand Co.*, 123 Va. 1, 96 S. E. 294, 297 (1918). Common-law decisions in other jurisdictions, however, to the effect that easements in gross are not assignable have led to their reclassification as "non-commercial" and "commercial", the latter being accorded full assignability. RESTATEMENT, PROPERTY, § 489. Along with pipeline and railroad rights of way, easements to flood fall into the commercial class, since "the use authorized . . . results primarily in economic benefit rather than personal satisfaction." *Ibid.* at comment *e*.

Assignability of easements in gross used for profit has also received direct encouragement from the courts in recognition of the social interest in permitting a market for commercial property interests. Assignable easements in gross capable of producing a financial benefit to the owner have a sale value. 2 AMERICAN LAW OF PROPERTY § 8.83, p. 291, 295, n. 1 (Casner ed. 1952).

U. S. 403, 407-410 (1878); *Olson* v. *United States*, 292 U. S. 246, 255-256 (1934); *United States* v. *Miller*, 317 U. S. 369, 373-375 (1943); and *United States* v. *Dickelson*, 138 F. 2d 343, 345 (4th Cir. 1943), *cert. den.* 321 U. S. 773 (1944). The value of respondent's easement to flood was not extinguished by the adoption and announcement of the Government's plan for the construction of the Kerr Dam and Reservoir (LEWIS, EMINENT DOMAIN, §707 p. 1283 (3rd ed. 1909); see *Boom Co.* v. *Patterson*, *supra*; *Shoemaker* v. *United States*, 147 U. S. 283 (1892); *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 70, 77, 78 (1913). And the Chief of Engineers recognized this when he directed the Division Engineer to prepare the proposed option contract with Mrs. Williams (R. 318):

> "Since the perpetual right to flow, permanently and/or intermittently, must be acquired over the entire area of approximately 1,810 acres, such right must also be obtained from the Virginia Electric Power Company, Inc. jointly, in the event of sale by the Vaughan Estate, or by separate transaction."

Instead of obtaining a conveyance from respondent or from Mrs. Williams, the government instituted this *in rem* proceeding in which respondent's property interest was extinguished. Its value did not disappear at the moment of the Government's taking. *See Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 337, 338 (1893). The Government cannot be heard to argue that "the ice values remained in" Mrs. Williams (U. Br. 19), which she has waived in several ways, or contend that all respondent had was "a cloud on" title, for which a purchaser would pay a nominal consideration for its removal (U. Br. 12, 21).

Respondent's easement to flood the land was not a water right (see 1 FARNHAM, WATERS AND WATER

RIGHTS, c. V, §§62-75, pp. 278-347, *passim* (1904)) subordinate to the Government's right to improve navigation, etc. (1 FARNHAM, *op. cit.* c VI, §79b, p. 380). This is sound doctrine and the distinction has been recognized by this court (e.g. *Pumpelly* v. *Green Bay & M. Canal Co.*, 13 Wall. 166 (1872); *United States* v. *Cress*, 243 U. S. 316 (1917); and *United States* v. *Kansas City Life Ins. Co.*, 339 U. S. 798 (1950)); see 1 FARNHAM, *op. cit.* c VI, §79a, pp. 377-379. The court below recognized this important distinction when it said 270 F. 2d 707, 711, (R. 333):

> "Although it is true that the Power Company could not use the waters of the stream for power purposes except with the approval of the United States, it is equally true that neither the United States nor anyone else could use the land in connection with the stream as a power site so long as the Power Company possessed the flowage easement acquired from the owner of the fee."

The Government's principal argument is that in a taking by the United States the extinguishment of respondent's private property right to flood the land is not compensable because of the Government's paramount navigation servitude, even though respondent's interest in the land is not a usufructuary water right. As respondent views it, this is an improper extension of the doctrine of *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53 (1913) and *United States* v. *Twin City Power Co.*, 350 U. S. 222 (1956). Petitioner erroneously asserts that "what respondent actually seeks—though in deference to this Court's decision in *United States* v. *Twin City Power Co.*, 350 U. S. 222, it avoids the formulation—is value for its interest in land *predicated* upon the utility of that property interest in conjunction with a power

project." (P. Br. 15) Eight judges on two federal courts of appeal have refused to ignore this distinction. Speaking for himself, Circuit Judge Soper and District Judge Bryan, Chief Judge Parker said 235 F. 2d 327, 329, (R. 79-80):

> The holding of the Supreme Court in the Twin City case was that the availability of land on a navigable stream as a site for water power development could not be considered as an element of value in assessing damages on a taking by the government. Nothing in the opinion holds that compensation must not be made for other elements of value; and the case was expressly distinguished from *United States* v. *Kansas City Life Ins. Co.*, 339 U. S. 798 where, as here, "assertion of the dominant servitude in the navigable river injured property beyond the bed of the stream." See 350 U. S. at 225. In taking the flowage easement over the 1540 acre tract here involved, therefore, the government must make compensation on the basis of the difference in the value of the land with and without the easement taken on the principle that "the destruction of privately owned land is 'a taking' to the extent of the destruction caused." *United States* v. *Kansas City Life Ins. Co.*, *supra*, 339 U. S. 799, 809-810. Availability as a site for water power development must be excluded from consideration in making this valuation; but other elements of value not related to the flow of the stream, such as its value for agricultural or grazing purposes, can properly be considered. The amount thus determined must be paid into court by the government as compensation for the taking and must be awarded by the court to those having an interest in the land in accordance with their interest. The condemnation suit is a proceeding in rem. The owners of the res are entitled to have the compensation divided among them according to their interests in the res taken.

Later, when the flowage easements of the Twin City

Power Company were under consideration, Chief Judge Parker, writing for Circuit Judges Soper, Haynsworth and himself, held that flowage easements were compensable and remanded the case to the district court for evaluation according to the formula prescribed in the instant case. *United States* v. *Twin City Power Co.*, 248 F. 2d 108-113-114 (4th Cir. 1957), rehearing denied, 248 F. 2d 114-115; *cert. den.* 356 U. S. 918 (1958).

When the instant case was next before the court, Judge Soper, writing for himself, Circuit Judge Haynsworth and District Judge Thomson (270 F. 2d 707; R. 329), again rejected the Government's argument that compensation for respondent's flowage easement had been foreclosed by this Court's decision in the *Twin City* case.

The court of appeals for the Fifth Circuit has also rejected this contention, *United States* v. *Augusta Power Co.*, 278 F. 2d 1 (5th Cir. 1960),[33] citing and quoting extensively Judge Parker's second opinion in this case. Therefore, it is proper to say that the Government's syllogism in this case is as specious in law as it is in fact.

Contrary to the Government's contention, respondent's property interest in land has been extinguished. It is also true that respondent's expectancies have been frustrated, but respondent has not received any compensation or element of value "for the frustration of a business hope and expectancy . . ." (P. Br. 10, cf. 15-16). A property interest and a business expectancy are different and distinct, as was pointed out by this Court in *United States* v. *Grand River Dam Authority*, 363 U. S. 229, 236 (1960) where it said:

[33] Although the Government's supplemental memorandum to its petition for certiorari in this case, No. 757, O.T. 1959, pointed out that there was a conflict between the Fourth and Fifth Circuits regarding the measure of value of a flowage easement, the Government's opening brief does not mention this point.

> "The Court of Claims erred in failing to distinguish between an appropriation of property and the frustration of an enterprise by reason of the exercise of a superior governmental power."

See also, *Brooklyn Eastern District Terminal* v. *City of New York*, 139 F. 2d 1007, 1011-13 (2d Cir. 1944), *cert. den.* 322 U. S. 747 (1944).

On the contrary, we are concerned here with the value of an interest in land to which the United States had no right and which was not subservient, in any respect, to the Government's paramount navigation servitude. No one would contend that the United States or the holder of a federal license to dam the Dan River or the Roanoke River, of which the Dan is a tributary, would thereby have the right to flood the land of the Falkland tract up to contour 321′ without payment. Certainly the Government's paramount navigation servitude does not extend that far.

Respondent asked and has been awarded the same compensation, excluding water power value, it would have been entitled to receive for its easement to flood the Falkland tract up to contour 321′ had it been acquired or extinguished in a similar condemnation proceeding by a private power company holding a federal license to build a dam. The Government has not and cannot deny this. As far as we know, there is no double standard permitting a different measure of compensation for flowage easements when the United States is the condemnor. *United States ex rel. T.V.A.* v. *Powelson*, 319 U. S. 266, 278, 284 (1943); see also *United States* v. *Cress*, 243 U. S. 316, 319, 326, 329, 330 (1917).

If easements to flood are worthless as a matter of law when taken by the United States, it would follow that when the Government took such an easement from the owner of

an unencumbered tract of land, the owner would lose nothing and hence would be entitled to no compensation. Obviously such a result is untenable and therefore the theory must be unsound. Furthermore, if the Government were upheld here, in the future, it could first acquire the flowage easement for nothing and then deal with the owner of the underlying fee. The evidence here suggests that if the Government had acquired respondent's easement first and then proceeded against the owner of the fee, she would have been entitled only to damages for the added servitude. The Government's contention that in tracts subject to private easements to flood, the value remains in the fee owner, is not only incorrect, but would produce the inequitable vice of paying the fee owner twice, first when the easement is conveyed to the private owner and second when it is acquired by the Government. Contrary to the obvious expectations and intent of both the fee owner and the grantee of the easement to flood for a substantial consideration, the latter would get nothing and the former would receive a windfall.

II.

Compensation for the Government's Flowage Easement Was Correctly Determined

The pleadings show that this was a proceeding *against the land itself*, without specification of the ownership of interests therein, to acquire the right to overflow land, subject only "to existing easements for public roads and highways, for public utilities, for railroads and for pipelines" (R. 235).

Although the Government had an option agreement with Mrs. Williams, it was expressly subject to respondent's easement to flood, and the Government recognized that a conveyance from Mrs. Williams in accordance with the terms of the option contract would not have conferred on

the Government all the rights necessary for its flooding of the 1840 acres of the 7400 acre tract.

But the Government did not obtain a conveyance from either Mrs. Williams or respondent. Instead it proceeded *in rem* against the land itself and by so doing acquired its easement irrespective of the different ownerships and precluded the possibility of paying twice or paying the wrong person. *United States* v. *Dunnington*, 146 U. S. 338 (1892); Annot. L.R.A. 1917A, p. 690.

By so proceeding the United States acquired a new title interest and extinguished all previous interests in the tract inconsistent with the rights it had taken. In such a proceeding just compensation is fixed without regard to the various ownerships in the land, and the parties with interests therein are left to divide such compensation by agreement or by the adjudication of the value of the respective interests by the district court. *United States* v. *Dunnington, supra; Monongahela Navigation Co.* v. *United States*, 148 U. S. 312 (1893); *United States* v. *Welch*, 217 U. S. 333, 339 (1910); *United States* v. *Petty Motor Co.*, 327 U. S. 372, 376 (1940); *Duckett & Co.* v. *United States*, 266 U. S. 149 (1924).[34]

In the *Duckett* case, *supra*, Mr. Justice Holmes, writing for the Court, said: ". . . the accurate view would seem to be that such an exercise of eminent domain founds a new title and extinguishes all previous rights." 266 U. S. at 151.

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[34] Other authorities supporting this proposition are: *Meadows* v. *United States*, 144 F. 2d 741 (4th Cir. 1944); *Cullen & Vaughan Co.* v. *Bender Co.*, 122 Ohio St. 82, 170 N. E. 633; *United States* v. *25,936 Acres, etc.*, 153 F. 2d 277, 279 (3d Cir. 1946); *Eagle Lake Improvement Co.* v. *United States*, 160 F. 2d 182, 184 (5th Cir. 1947), cert. denied sub nom.; *Humble Oil & Ref. Co.* v. *United States*, 332 U. S. 762 (1947); *Burkhart* v. *United States*, 227 F. 2d 659, 662, 663 (9th Cir. 1955); Annot., 69 A. L. R. 1263, *supp.*, 166 A. L. R. 1211 (1947); 4 NICHOLS, EMINENT DOMAIN, §12.36[1], p. 144 (3d ed. 1951); 2 LEWIS, EMINENT DOMAIN, §716, p. 1253 (3d ed. 1909).

Thus it is clear that respondent's property right was extinguished in this proceeding.[35] The condemnor's agreement to pay compensation to one of the owners of an interest therein does not affect the rights of other claimants. *Duckett & Co.* v. *United States, supra,* 266 U. S. at 151; *United States* v. *Petty Motor Co., supra,* 327 U. S. at 374.

The compensation for the flowage easement the Government has taken from the land itself is measured by the difference in value of the servient land before and after the taking. *Olson* v. *United States,* 292 U. S. 246, 253, 255-257 (1934); *Karlson* v. *United States,* 82 F. 2d 330-337 (8th Cir. 1936); *United States* v. *Miller,* 317 U. S. 369, 374-375 (1943); *Slattery Co.* v. *United States,* 231 F. 2d 37 (5th Cir. 1956) *cf. United States* v. *Cress,* 243 U. S. 316 (1917).[36]

The court of appeals recognized the importance of this aspect of the case on two different occasions. Because this was an *in rem* proceeding, it rejected the Government's contentions (1) that the Government's flowage easement was only an additional or second easement upon the land; (2) that the Government's settlement with the owner of the fee affected respondent's rights; and (3) that respondent's flowage easement to flood, rather than the easement taken by the Government, was all that should be valued. 235 F. 2d 327, 329; 237 F. 2d 165, 166. Although petitioner's brief does not argue that the court of appeals was wrong

[35] See Restatement of Property § 507, p. 3092.

[36] In the United States Army Corps of Engineers *Real Property Appraisers' Handbook* (U. S. Government Printing Office, October 1955) it is said (at page 34): "In valuing flowage easements, appraisals of the fair market values of two distinct estates are required: the entire land tract before imposition of the easement and the entire land tract after imposition of the easement. *The difference between the appraisals of the two estates represents the damages, or the value of the easement.* See also Saxon, *Appraising Flowage Easements,* The Appraisal Journal, October 1956, p. 490 ff.

in this, the petitioner continues to make substantially the same arguments which were rejected by the court of appeals as having no relevancy or bearing in an *in rem* proceeding, such as (1) the Government has taken only "a flowage easement from the fee owner" (P. Br. 9 cf. pp. 11, 20) and (2) that "nothing valuable was taken from respondent when the United States obtained an easement from Mrs. Williams . . ." (P. Br. 20). It should be noted again that under the pleadings the Government's flowage easement was not subject to respondent's easement, nor was it imposed upon respondent's easement, nor was it co-extensive with respondent's easement.

III.

The United States Has No Concern With the Distribution of the Award

Where the condemnor has paid into court just compensation for the property taken in an *in rem* condemnation proceeding, it has performed its duty and no matter how large or diverse are the claimants to the fund, its distribution is not any concern of the condemnor. *United States* v. *Dunnington*, 146 U. S. 338, 352-353 (1892); *City of St. Paul* v. *Certain Lands, etc.*, 58 F. 2d 805, 807 (8th Cir. 1931); *United States* v. *Certain Lands in Borough of Brooklyn*, 129 F. 2d 577 (2nd Cir. 1942); *Meadows* v. *United States*, 144 F. 2d 751, 752-753 (4th Cir. 1944).[37]

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[37] Other authorities on this point are: *United States* v. *19,573.59 Acres of Land in Cheyenne County, Nebraska*, 70 F. Supp. 610 (D. Neb. 1947), *aff'd sub nom. State of Nebraska* v. *United States*, 164 F. 2d 866 (8th Cir. 1947), *cert. den.* 334 U. S. 815 (1948); *United States* v. *Adamant Co.*, 197 F. 2d 1, 5 (9th Cir. 1952); 2 NICHOLS, EMINENT DOMAIN, § 5.3[4], p. 51 (3rd ed. 1950); 4 NICHOLS, *op. cit. supra*, § 12.42[2], p. 172; Annot. L. R. A. 1917A, p. 690; Rule 71A(c), F. R. C. P.; 3 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, § 1519, p. 554 (Rules ed.).

It would seem under the foregoing authorities that the government has no standing to contest respondent's right to a portion of the award or the amount respondent should receive for its extinguished easement to flood most of the same land. This should end the Court's inquiry in this case.

Nevertheless, respondent will answer briefly petitioner's arguments upon this phase of the case.

IV.

The Allocation for Respondent's Easement Was Proper

Respondent's extinguished easement was perpetual and exclusive. It was an assignable or commercial easement in gross under the terms of the grant (Def. Exh. C, R. 172). Its value was, as the courts below held, the difference in the value of the servient tenement. 3 POWELL, REAL PROPERTY, § 426, p. 507 (1952); Restatement, Property, § 508, com d. The commissioners did this, under the district court's second inquiry, and their finding was approved and adopted by the district court. Because of the *in rem* feature of the case, that evaluation assumed that the Government's flowage easement was co-extensive not only in area but in nature (interimittent as contrasted with permanent flooding). The "before and after" method included, of course, the damages as well as the special benefits, if any, to the residue. This procedure was proper because respondent's easement was viable and could have been exercised by the Government according to its terms upon acquisition. Compensation is determined on the basis of the rights acquired and not according to the use actually intended.[38] This

[38] See Annot. 75 A.L.R. pp. 855-71; *cf.* Annot. 7 A.L.R.2d pp. 394-407.

method is consistent with the cases where an easement appurtenant has been extinguished. E.g., *United States* v. *Welch*, 217 U. S. 333 (1910). The case of *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189 (1910) (P. Br. 12, 21) cannot be related to the instant case for there the city's condemnation of a private way in order to make it a public way did not materially affect the dominant tenement. Here respondent's easement was totally destroyed. *Roberts* v. *New York City*, 295 U. S. 264 (1935), does not support the proposition for which it is cited by petitioner (P. Br. 11, 18). There this Court held that no additional compensation should be paid for the interests of the elevated railroad, that was abandoning its operation on the streets in question, because they were "*not* easements in gross assignable to strangers generally . . . [but merely] a release from liability from past and future damages." 295 U. S. at 280-1.

The important matter here is that as far as the underlying fee owner was concerned, she approved of respondent's participation in the award and the amount thereof. She regarded respondent's easement, as did the courts below, as "transferring to [respondent] the right to the compensation awarded for the flowage rights condemned by the government". 235 F. 2d 327, 330 (1956). (R. 81).

Petitioner has advanced no argument that either the courts below or Mrs. Williams was wrong.

With regard to petitioner's argument that respondent has received "fee values" which did not belong to it, we have already demonstrated that this is not factually correct. Further, respondent submits the valuation of respondent's easement by the "before and after" method was fair and accords with established principles.

The Government's analogy to proceedings under the Tucker Act (P. Br. 22) affords it no comfort. The court below rejected this argument as well and petitioner has

not advanced any reason indicating that the court erred. Petitioner's argument is based upon the erroneous premise that the procedure under the Tucker Act would be different from that followed in the instant case. In *Jacob's* v. *United States*, 290 U. S. 13, 16 (1933) this Court said: ". . . the fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim." See also *United States* v. *Dow*, 357 U. S. 17 (1958); *Hurley* v. *Kincaid*, 285 U. S. 95, 104 (1932); *United States* v. *Cress*, 246 U. S. 316 (1917) and *United States* v. *Dickinson*, 152 F. 2d 865 (4th Cir. 1946), aff'd 331 U. S. 745 (1947).

Respondent cannot entertain seriously the Government's reiteration of its previous arguments to the effect that respondent was not entitled to any value attributable to the damages to the residue. The amount of such damages was $11,720. The Government has never suggested a remittitur for that amount. Furthermore, all of the cases the Government cites (P. Br. 24-25) were all considered by the court below and held to be inapposite because ". . . the Falkland tract . . . was held in single ownership by Mrs. Williams subject to the Power Company's easement."; and, further, that ". . . the market value of the interest of the Power Company may nevertheless be measured by what it would cost to acquire it, and this necessarily includes not only the value of the land for agricultural and forestry purposes but also the damages to the remainder of the tract." 270 F. 2d 707, 713-714; R. 337-338.

CONCLUSION

In this case the Government has been required to pay less than it would have had to pay in an ordinary case for the acquisition of a flowage easement. Simply because there was

a previous conveyance of an easement to flood does not justify the Government's acquiring its flowage easement for nothing.

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

GEORGE D. GIBSON
RALPH H. FERRELL, JR.
FRANCIS V. LOWDEN, JR.
PERKINS WILSON

TABLE OF VALUATIONS AND COMMISSION'S FINDINGS

Witness:	Inquiry Number ‡	Fee Value/Depreciation Per Acre: Below 302' (890 Acres)* "Blue" †	Between 302' & 321' (650 Acres) "Yellow" †	Between 321' & 330' (300 Acres) "Salmon" †	Above 330' (5560 Acres) "White" †	I Value Before Taking 7400 Acre Tract	II Value After Taking 7400 Acre Tract	III Just Compensation: Difference in Value Before and After Taking	"Damages to Residue" Included in Column III
Clark:									
(R. 104-23; Tr. 74-78¶)	1	$45 and $70/100%	$70/75%	$50/30%	$55 and $70/5%	$644,690.25	$518,220.25	$126,470.00	$27,274.75
	2	45 and 70/100%	70/75%	50/5%	55 and 70/5%	644,690.25	521,970.50	122,719.75	28,024.75
	3	45/100%	45/75%	45/75%	Not applicable	82,800.00	10,687.50	72,112.50	Not applicable
	4	45/100%	45/75%	45/70%	Not applicable	82,800.00	11,362.50	71,437.50	9,450.00
Felton:									
(R. 123-33; Tr. 112-14¶)	1	25 and 80/100%	80/8ths	60/50%	20/20%	602,712.55	458,578.00	144,134.55 (sic)	22,240.00
	2	25 and 80/100%	70/8ths	60/20%	20/20%	603,712.55	464,978.00	138,734.55	25,840.00
	3	25 and 60/100%	60/95%	45/80%	Not applicable	103,478.15	4,650.00	98,828.15	Not applicable
	4	25 and 60/100%	60/95%	45/50%	Not applicable	103,478.15	8,700.00	94,778.15	6,750.00
Commission's Findings:									
(R. 99 at 101-104)	1	?/?	?/?	?/?	?/?	596,000.00	525,080.00	70,920.00	11,120.00
	2	?/?	?/?	?/?	?/?	596,000.00	530,580.00	65,520.00 (sic)	11,720.00
	3	?/?	?/?	?/?	Not applicable	73,600.00	13,800.00	59,800.00	Not applicable
	4	?/?	?/?	?/?	Not applicable	73,600.00	14,100.00	59,500.00	9,000.00

Footnotes:

* The Government conceded that this land would be flooded permanently. (R. 243. Cf. Def. Exh. H, R. 313 at 315.)

† Areas designated by these colors on Government Exh. No. 2 (R. 236) and thus referred to in the testimony.

‡ The nature of the four inquiries was:

No. 1—U. S. flowage easement over 1840 acres of 7400 acre tract.

No. 2—U. S. flowage easement over 1540 acres of 7400 acre tract.

No. 3—U. S. flowage easement if limited to 1840 acre tract.

No. 4—U. S. flowage easement if limited to 1540 acres of an 1840 acre tract.

¶ The witnesses' valuations under the third and fourth inquiries are taken from that portion of the transcript of the hearing on June 3, 1958 (R. 473) which has not been printed.

It should be noted that in all instances the rights acquired by the Government were those described in its certificate of taking (R. 1 at 4) and condemnation petition (R. 8 at 9-10), Exhibit B, attached to the order appointing commissioners (R. 86 at 88-89, 235) and referred to in the commissioners' report (R. 99 at 100-101).

SUPREME COURT OF THE UNITED STATES

No. 49.—October Term, 1960.

United States, Petitioner, v. Virginia Electric and Power Company.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[April 3, 1961.]

Mr. Justice Stewart delivered the opinion of the Court.

In 1944 Congress authorized the construction of a dam and reservoir on the Roanoke River in Virginia and North Carolina. For purposes of that project the Government acquired by condemnation a flowage easement over 1840 acres of fast lands adjacent to the Dan River, a navigable tributary of the Roanoke. This 1840-acre tract was part of a 7400-acre estate. The respondent owned a perpetual and exclusive flowage easement over 1540 acres within the easement taken by the Government. The only question presented by this case concerns the compensation awarded to the respondent for the destruction of its easement.

The respondent's easement had been purchased from the owner of the estate and had been conveyed to the respondent's predecessors in title by various deeds over a period of many years, beginning in 1907. Along with the easement the fee owner had also expressly granted by deed the release of all claims for damage to the residue of the estate resulting from the exercise of rights under the easement.

In 1951, after extended negotiations, the owner of the estate agreed to convey to the Government a flowage easement over the 1840-acre tract in return for the pay-

ment of one dollar.[1] This agreement was expressly made subject to "such water, flowage, riparian and other rights, if any," as the respondent owned in the tract. The agreement also provided that the Government could elect to acquire its easement by a condemnation proceeding, in which event the agreed consideration of one dollar would be "the full amount of the award of just compensation inclusive of interest." Exercising this election, the Government instituted condemnation proceedings in the District Court to acquire a flowage easement over the 1840 acres in question, depositing one dollar as the estimated just compensation for the property to be taken. The fee owner acknowledged the settlement contract previously made and agreed to the one dollar compensation. The respondent, whose easement was to be destroyed, intervened in the proceedings to contest "the issue of just compensation."

The District Court made a substantial award to the respondent as compensation for the taking of its flowage easement. The judgment was affirmed by the Court of Appeals for the Fourth Circuit, on the authority of that court's decision in *United States* v. *Twin City Power Co.*, 215 F. 2d 592. 218 F. 2d 524. After the judgment in the *Twin City* case was reversed by this Court, 350 U. S. 222, we vacated the judgment in this litigation and remanded the case to the Court of Appeals for further consideration in the light of our *Twin City* decision. 350 U. S. 956. The Court of Appeals in turn remanded the case to the District Court with instructions that, in computing the amount of compensation to be awarded for the taking of the respondent's easement, there should be eliminated "any element of value arising from the availability of the

[1] The record indicates that the owner was willing to accept this nominal amount because of her interest in developing the balance of the estate as a wild game preserve, a use which presumably would be enhanced by a contiguous artificial lake.

land for water power purposes due to its being situate on a navigable stream. 235 F. 2d 327, 330, rehearing denied 237 F. 2d 165.

On remand the District Court proceeded in accordance with these directions. Commissioners were appointed and given detailed instructions to follow in computing the compensation to be awarded the respondent. These instructions included an explicit direction to exclude from the computation any element of value arising from the availability of the land for water power purposes attributable to its location on a navigable stream.[2] The Commissioners found that, under the criteria imposed by the court, the value of the respondent's easement was $65,520. The district judge accepted these findings, and in accordance with them awarded the respondent that sum. On appeal the judgment was affirmed. 270 F. 2d 707.

We granted certiorari to consider the Government's claim that the respondent's easement had no compensable value when appropriated by the United States. 362 U. S. 947. For the reasons that follow we reject that argument in the extreme form it has been presented, but we have concluded that the judgment must nonetheless be set aside for a redetermination of the compensation award.

It is indisputable, as the Government acknowledges, that a flowage easement is "property" within the meaning of the Fifth Amendment. See *United States* v. *Welch*, 217 U. S. 333; *Panhandle Co.* v. *Highway Comm'n*, 294 U. S. 613, 618; *Western Union Tel. Co.* v. *Penn. R. Co.*, 195 U. S. 540, 570. Similarly, there can be no question that the Government's destruction of that easement would ordinarily constitute a taking of property

[2] The detailed instructions were otherwise based upon a traditional method of valuing what the Government appropriated, *i. e.*, the difference in the value of the servient land before and after the Government's easement was imposed.

within the meaning of the Fifth Amendment. See *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 181; *United States* v. *Cress*, 243 U. S. 316, 327–329; *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799, 809–811. Nevertheless, it is argued that the Government cannot be required to pay compensation for the destruction of the easement in the present case because the easement was subject to the overriding navigational servitude of the United States.

This navigational servitude—sometimes referred to as a "dominant servitude," *Federal Power Comm'n* v. *Niagara Mohawk Power Co.*, 347 U. S. 239, 249, or a "superior navigation easement," *United States* v. *Grand River Dam Authority*, 363 U. S. 229, 231—is the privilege to appropriate without compensation which attaches to the exercise of the "power of the government to control and regulate navigable waters in the interest of commerce." *United States* v. *Commodore Park*, 324 U. S. 386, 390. The power "is a dominant one which can be asserted to the exclusion of any competing or conflicting one." *United States* v. *Twin City Power Co.*, 350 U. S. 222, 224–225; *United States* v. *Willow River Co.*, 324 U. S. 499, 510. A classic description of the scope of the power and of the privilege attending its exercise is to be found in the Court's opinion in *United States* v. *Chicago, M., St. P. & P. R. Co.*:

> "The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. [Citing cases.] The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that

property has always been subject." 312 U. S. 592, 596–597.

Since the privilege or servitude only encompasses the exercise of this federal power with respect to the stream itself and the lands beneath and within its high-water mark, the Government must compensate for any taking of fast lands which results from the exercise of the power. This was the rationale of *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799, where the Court held that when a navigable stream was raised by the Government to its ordinary high-water mark and maintained continuously at that level in the interest of navigation, the Government was liable "for the effects of that change [in the water level] upon private property beyond the bed of the stream." 339 U. S., at 800–801. See also *United States* v. *Willow River Co.*, 324 U. S. 499, 509.

But though the Government's navigational privilege does not extend to lands beyond the high-water mark of the stream, the privilege does affect the measure of damages when such land is taken. In *United States* v. *Twin City Power Co.*, 350 U. S. 222, we held that the compensation awarded for the taking of fast lands should not include the value of the land as a site for hydroelectric power operations. It was pointed out that such value, derived from the location of the land, is attributable in the end to the flow of the stream—over which the Government has exclusive dominion. 350 U. S., at 225–227. Thus, just as the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss, *United States* v. *Commodore Park*, 324 U. S. 386, 390–391; *Scranton* v. *Wheeler*, 179 U. S. 141, 162–165; *Gibson* v. *United States*, 166 U. S. 269, 276, it also permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated.

The Government's argument is that the rationale of *Twin City* makes payment of any compensation for the destruction of the respondent's easement unnecessary in the present case. This argument is based on the theory that the respondent's easement had no value save in conjunction with water power development. The respondent acknowledges that the courts below were correct in excluding any value of the easement derived from the availability of the land for water power purposes. It argues, however, that the easement had other value, derived from uses of the land not dependent upon the flow of the stream. If the easement did have such value, then the Government must compensate for the easement's destruction under the rule of *Kansas City Ins. Co., supra*, since the easement was a property right in fast lands. The basic issue is thus whether the respondent's easement might be found to have value other than in connection with the flow of the stream.

We think such a finding might be warranted. The evidence was that the highest and best use of the servient land (unconnected with riparian uses) was for agriculture, timber and grazing purposes. The respondent had an exclusive and perpetual property right to destroy those uses and the value which they created. This right was an attribute of a transferable, commercial easement with intrinsic value. It had been acquired for a valuable consideration. It had a marketability roughly commensurate with the marketability of the subservient fee. Only an adventurous purchaser would have acquired the underlying fee interest in the 1540-acre tract for any purpose whatever, without also purchasing the easement.

If easements to flood fast lands were worthless as a matter of law when taken by the United States, it would follow that when the Government took such an easement from the owner of an unencumbered tract of land, the Government would have to pay the owner nothing.

That is not the law. *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799. The Government itself acknowledges that it must pay such a landowner for the value of the property which does not stem from the flow of the stream, the value based upon the nonriparian uses of the property.

It follows that the Government must likewise compensate the easement owner for that aspect of the easement's value which is attributable not to water power, but to the depreciative impact of the easement upon the nonriparian uses of the property. The valuation of an easement upon the basis of its destructive impact upon other uses of the servient fee is a universally accepted method of determining its worth. See, *e. g.*, *Olson* v. *United States*, 292 U. S. 246, 253; *Karlson* v. *United States*, 82 F. 2d 330, 337; Jahr, Eminent Domain, 252 and n. 6 (collecting cases); 4 Nichols, Eminent Domain, § 12.41 [2], n. 27 (collecting cases) (1951 ed.); 1 Orgel, Valuation under Eminent Domain, § 106, at 454 (2d ed.); Saxon, Appraising Flowage Easements, 24 Appraisal Journal 490, 494.

But the Government contends that the market value of the easement to those interested in developing the nonriparian uses of the fee can be ignored. It is claimed that, despite the general principle of indemnification underlying the Fifth Amendment, see *Olson* v. *United States*, 292 U. S. 246, 255, no compensation should be allowed for this value because it represents the "destructive function" of the easement. Cf. *Roberts* v. *New York*, 295 U. S. 264, 283. It is argued that equitable principles prohibit compensation for such value. But equity works the other way. At the very least, the Government's argument would mean, in a case like this one, that compensation could be denied the fee owner because he had already conveyed the flowage easement, cf. *United States* v. *Sponenbarger*, 308 U. S. 256, 265–266, and denied the owner of the easement because it was valueless against condemnation by the United States. The Government would thus

destroy the entire property interest in fast lands without compensation. "The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity' . . . ." *United State* v. *Commodities Corp.*, 339 U. S. 121, 124; see *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 324–326. The result contended for by the Government would hardly comport with those standards. The District Court and the Court of Appeals were correct in holding that a flowage easement over fast lands adjoining a navigable stream is property which cannot be appropriated without compensating the owner.

The remaining question is whether the District Court's method of determining the amount of compensation to be awarded was correct. The court was clearly right in excluding all value attributable to the riparian location of the land. *United States* v. *Twin City Power Co.*, 350 U. S. 222. There can be no quarrel either with the court's procedure in directing the Commissioners to appraise first the easement taken by the Government, and then to apportion its value between the respondent and the owner of the subservient fee.[3] *United States* v. *Dunnington*, 146 U. S. 338, 343–345, 350–354. And the court adopted an acceptable method of appraisal, indeed the conventional method, in valuing what was acquired by the Government by taking the difference between the value of the property before and after the Government's easement was imposed. See *Olson* v. *United States*, 292 U. S. 246, 253.[4] For these reasons we think that the

[3] The owner of the fee, having agreed to convey her interest for one dollar, would, of course, not receive any larger amount apportioned to her interest. See *Albrecht* v. *United States*, 329 U. S. 599.

[4] In determining the value of the Government's easement, the court assumed its proportions to be limited to 1540 acres, rather than to the 1840 acres actually taken. This was entirely permissible. Since the owner of the fee was making no claim, the only objective of the proceedings in the District Court was to determine the amount of compensation to be awarded the respondent. It was quite logical,

court followed an entirely acceptable procedure in valuing the totality of what was appropriated by the Government.

In apportioning the respondent's share of this value, however, we think that the court erred.[5] The court apparently was of the view that the subservient fee interest in the 1540 acres was without value, and accordingly awarded to the respondent the entire value of what the Government appropriated in that acreage. The respondent was thus compensated as though it were the owner, not of an easement, but of an unencumbered fee, as the Court of Appeals recognized. 270 F. 2d, at 712. The record does not support such an apportionment.

The guiding principle of just compensation is reimbursement to the owner for the property interest taken. "He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more." *Olson* v. *United States*, 292 U. S. 246, 255. In many cases this principle can readily be served by the ascertainment of fair market value—"what a willing buyer would pay in cash to a willing seller." *United States* v. *Miller*, 317 U. S. 369, 374. See *United States* v. *Commodities Corp.*, 339 U. S. 121, 123; *United States* v. *Cors*, 337 U. S. 325, 333. But this is not an absolute standard nor an exclusive method

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therefore, to appraise only that part of the Government's easement which coincided with the respondent's property interest, and thereafter to apportion to the respondent its share of what was taken by that much of the Government's appropriation.

[5] The court did not err, however, in including in the award to the respondent an amount for damages to the residue of the estate. The respondent was the record owner of the right to damage the residue, a right which the owner had expressly conveyed by separate deed for a valuable consideration. This was a property right in the residue, measurable by a monetary award to cover damages to the same. The amount of this portion of the award would depend upon the probability of the respondent's easement being exercised. See accompanying text, *infra*.

of valuation. See *United States* v. *Commodities Corp.*, *supra*, at 123; *United States* v. *Cors*, *supra*, at 332; *Miller* v. *United States*, *supra*, at 374–375; *United States* v. *Toronto Nav. Co.*, 338 U. S. 396.

The record in the present case, as might be expected, contains no evidence of a market in flowage easements of the type here involved. In the absence of such evidence, the court valued the flowage easement as the equivalent of the value of the subservient lands for agricultural, forestry, or grazing use. The court thus ascribed a maximum value to the respondent's easement, a value not supported by the record.

We think the correct approach to the problem of valuation in a case of this kind was formulated by the Court of Appeals for the Fifth Circuit in *Augusta Power Co.* v. *United States*, 278 F. 2d 1. The basic issues in that case were virtually indistinguishable from those presented here.[6] We are content to adopt the language of Judge Rives' opinion with respect to the standard to be followed in valuing flowage easements of this character:

> "If [the] Power Company had been successful in assembling the necessary lands, and in securing approval of the Federal Power Commission, and thereafter had actually exercised its easements by permanently flooding the lands, their value for agricultural and forestry purposes would have been destroyed. If, with that status, the United States had condemned the lands, the compensation due would be payable to [the] Power Company. That

[6] In that case the Government had also argued upon the basis of our *Twin City* decision, that a private flowage easement over fast lands is valueless as a matter of law when taken by the Government for navigational purposes. The argument was unambiguously rejected: "Very clearly, the United States is 'in error when it claims . . . that it 'has a dominant servitude which it can exercise in its discretion and without compensation.'" 278 F. 2d, at 4.

compensation would not include the hydroelectric power value, but it would embrace [the Power Company's] property right to destroy the value of the lands for agricultural and forestry purposes.

"At the other extreme, if factors such as difficulty of assemblage of all necessary lands, the increasing economic advantage of steam plants over hydroelectric plants, the need for additional power in the particular area, etc., had made it certain that the flowage easements would never be exercised by the . . . Power Company or its assigns, *excluding the United States*, then such compensation as might be due would be payable to the owners of the fee title and nothing to the . . . Power Company.

"Between the two extremes just illustrated, the respective values of the fee and of the easement would fluctuate from time to time depending on the probability or improbability of actual exercise of the easement by the . . . Power Company or its assigns. If all interested parties were before the Court, the *maximum* which the United States would be required to pay would be the value of the lands, not including their value for hydroelectric power purposes. That is, however, a *maximum*, and not necessarily the measure of what the United States would have to pay under any and all circumstances.

. . . . . .

"It seems to us that the *maximum* compensation payable for the flowage easement under any conceivable circumstances is so much of the value of the lands for agricultural and forestry purposes and for any other uses, not including hydroelectric power value, as the easement owner has a right to destroy or depreciate. That *maximum* is more simply expressed in the criterion adopted by the Commission, *i. e.*, 'the difference in the value of the land with and

without the flowage easement.' Subject to that *maximum*, the actual *measure* of compensation payable for the flowage easement is the value of the easement to its owner. 'The question is, What has the owner lost? not, What has the taker gained.' 1 Orgel on Valuation Under Eminent Domain, p. 352." *Augusta Power Co.* v. *United States*, 278 F. 2d 1, 4–5. (Footnotes omitted.)

In a word, the value of the easement is the nonriparian value of the servient land discounted by the improbability of the easement's exercise. It is to be emphasized that in assessing this improbability, no weight should be given to the prospect of governmental appropriation. The value of the easement must be neither enhanced nor diminished by the special need which the Government had for it. *United States* v. *Cors*, 337 U. S. 325, 332–334; *United States* v. *Miller*, 317 U. S. 369; *Olson* v. *United States*, 292 U. S. 246, 261; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 76. The court must exclude any depreciation in value caused by the prospective taking once the Government "was committed" to the project. *United States* v. *Miller*, *supra*, at 376–377; see *United States* v. *Cors*, *supra*, at 332. Accordingly, the impact of that event upon the likelihood of actual exercise of the easement cannot be considered. As one writer has pointed out, "[i]t would be manifestly unjust to permit a public authority to depreciate property values by threat of . . . [the construction of a government project] and then to take advantage of this depression in the price which it must pay for the property" when eventually condemned. 1 Orgel, Valuation under Eminent Domain, § 105, at 447 (2d ed.); see *Congressional School of Aeronautics* v. *State Roads Comm'n*, 146 A. 2d 558, 565 (Md.).

The judgment is vacated, and the case remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 49.—October Term, 1960.

United States, Petitioner, v. Virginia Electric and Power Company.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[April 3, 1961.]

Mr. Justice Douglas, concurring.

If the 1,840 acres in question lay between low and high water, the United States by keeping the water level at the ordinary high-water contour would not in my view appropriate any private property. For that is use of the bed of the stream pursuant to the navigation servitude. Most of our cases deal with that. It was in that domain that *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799, arose.

If the 1,840 acres were a dam site, any of their value for such a purpose would be noncompensable within the ruling of *United States* v. *Twin City Power Co.*, 350 U. S. 222. Dam site value is water-power value. And the flow of the stream in its natural state or through a structure that is low or high provides "a head of water" (*United States* v. *Willow River Co.*, 324 U. S. 499, 502) that often has great value. But when it is in a navigable stream, it is not a property right subject to private ownership and compensation under the Fifth Amendment. There is "no private property in the flow" of this navigable stream. *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 427.

Yet if the Federal Government builds a dam that raises the water above the ordinary high-water mark by a foot, by a hundred feet, or by five hundred feet, it asserts

dominion over property not within its navigational servitude. As we said in *United States* v. *Willow River Co.*, *supra*, 509, "High-water mark bounds the bed of the river. Lands above it are fast lands and to flood them is a taking for which compensation must be paid."

It is in the latter domain that the present controversy lies. The flowage rights being condemned are rights to flood a part of the 1,840-acre tract that lies above the "usual water line" which I understand to mean land above the ordinary high-water mark.

Whatever may be the reason why this particular interest in the uplands was acquired, the owner stands in the shoes of his predecessor in title. The owner of the easement is entitled, as the Court holds, to no water-power value. The owner is in other words entitled to nothing that gains value from the flow of the stream, from any head of water, or from the strategic location of his land for hydroelectric development of the river. But the owner of the easement and the owner of the subservient fee have all the other parts of the bundle of rights that represent "property" within the meaning of the Fifth Amendment.

Hence, I join the opinion of the Court.

SUPREME COURT OF THE UNITED STATES

No. 49.—October Term, 1960.

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[April 3, 1961.]

Mr. Justice Whittaker, with whom The Chief Justice and Mr. Justice Black join, dissenting.

In the hope that it might eventually acquire from the Federal Government a license to construct a power dam across a navigable river, the power company acquired, by conveyances from the fee owners, easements permanently to flood 1,540 acres of fast lands adjacent to the river. It did not own any other estate or interest in those lands, and the exercise of its easement to flood them was, of course, necessarily subject to the prior issuance of a federal license authorizing the private damming of the river, for without such a license the power company could not dam the river, see § 4 of the Federal Power Act, 41 Stat. 1065, 16 U. S. C. § 797, and thus back its waters upon those lands, and it had no right to use the lands for any other purpose.

No federal license to dam the river at or near this point was ever issued. Instead, the Federal Government determined to itself construct a power dam at this point in the river, and as a necessary consequence to inundate these lands as a part of the resulting reservoir. To that end, it brought this condemnation action against the power company, and therein filed its declaration of taking, and took, the latter's easement to back flow these lands, and the question here is: What value, if any, did that easement have *to the power company at the time* the Government took it?

We think that, as a matter of fact and of law, it did not have any value whatever at that time. This is so because: (1) The sole and only right the power company ever had in these lands was the right to dam and back the river's waters upon them; (2) the exercise of that right was always contingent and dependent upon the prior issuance of a federal license authorizing the private damming of the river (16 U. S. C. § 797(e)), for the Government's power over the flow of a navigable stream "is a dominant one which can be asserted to the exclusion of any competing or conflicting one." *United States* v. *Twin City Power Co.*, 350 U. S. 222, 224–225, and (3) when the Government determined to construct the power dam and appurtenant facilities for its own benefit, it necessarily "displace[d] all competing interests and appropriate[d] the entire flow of the river for the declared public purpose," *United States* v. *Twin City Power Co.*, *supra*, at 225. (4) Therefore, at the time the Government took this easement, there was no possibility that the power company could ever dam and back the river's waters upon these lands and, inasmuch as it had no estate in or right to use the lands for any other purpose, it must follow that the easement was wholly without value to the power company for any purpose at the time the Government took it.

However, the Court, after adverting to the power company's argument that "the easement had other value, deriving from uses of the land not dependent upon the flow of the stream," says: "We think such a finding might be warranted." It finds such value to exist in the "right to destroy [agriculture, timber and grazing] uses and the value which they created."

But the right to "destroy" agricultural uses, although a proper consideration in determining the damages to be paid to the owner of the unencumbered fee when an easement to flow is being condemned and taken from him, *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799;

Olson v. *United States*, 292 U. S. 246, 253–254, is not a thing of value—even of recognizable "hold up" value—to the owner of the easement. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 79–80, except for the authorized flooding use; or possibly as against the owner of the subservient fee who might be willing to pay for the riddance of the easement and restoration of his original right to make agricultural uses of the land. *See Roberts* v. *New York City*, 295 U. S. 264, 282–283. At all events, the clincher is that any right of the power company to "destroy" agricultural uses of these lands consisted solely of its right to dam and back the river's waters upon them and when the Government determined to construct the dam for its own benefit even that nebulous "right" was gone. Hence, the easement had no possible value—not even a nuisance value—to the power company at the time the Government took it.

It is settled that the "just compensation" required by the Fifth Amendment to be paid for the taking of private property for public use is the value at the very time of the taking to the person from whom taken. "The value should be fixed as of the date of the proceedings and with reference to the loss the owner sustains, considering the property in its condition and situation at the time it is taken and not as enhanced by the purposes for which it was taken. *Kerr* v. *Park Commissioners*, 147 U. S. 379, 387; *Shoemaker* v. *United States*, 147 U. S. 282, 304, 305." *United States* v. *Chandler-Dunbar Co.*, *supra*, at 76.

The Fifth Amendment "merely requires that an owner of property taken should be paid for what is taken from him. . . . And the question is what has the owner lost, not what has the taker gained." *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195. See also *United States* v. *Twin City Power Co.*, *supra*, at 228. At the time of this taking, the Government had determined to build the dam itself, thus precluding any possibility that

the power company could ever dam and back the river's waters upon these lands, and, inasmuch as it had no right to use them for any other purpose, it must follow that the easement had no possible value to the power company at the time the Government took it. Surely "the Government cannot be justly required to pay for an element of value which did not [then] inhere in [the easement]." *United States* v. *Chandler-Dunbar Co.*, *supra*, at 76.

Nor does the Fifth Amendment contemplate a disregard of separate estates and interests in land. It contemplates only that the condemnee shall be paid "just compensation" for the particular estate or interest that he owned and that was taken from him. In *Boston Chamber of Commerce* v. *Boston*, *supra*, the city condemned for public street purposes a part of a tract of land owned in fee by the Chamber of Commerce, but over a large portion of the part condemned a wharf company owned "an easement of way, light and air." The Chamber of Commerce and the wharf company agreed between themselves to claim, and they sought, damages to both estates "in a lump sum." If this could be done, it was agreed that the estate, considered as the sole unencumbered estate of a single person, was worth 12 times more than if the damage should be assessed according to the condition of the title at the time. The city's contention that the several estates should be separately valued was sustained by the trial court, and this Court, speaking through Mr. Justice Holmes, affirmed, saying:

> "But the Constitution does not require a disregard of the mode of ownership—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is

> taken from him. . . . And the question is what has the owner lost, not what has the taker gained." 217 U. S., at 195.

The Government cannot here, just as the city could not there, "be made to pay for a loss of theoretical creation, suffered by no one in fact," *id.*, at 194, for there is "no justice in [requiring the Government to pay] for a loss suffered by no one in fact." *United States* v. *Chandler-Dunbar Co.*, *supra*, at 76.

Here the power company rests solely upon a claimed right to back the river's waters upon these lands. It thus necessarily depends upon and claims a right in and to use the waters of the river for that purpose. This Court held in the *Twin City* case, *supra*, that the owner of adjoining fast lands has no interest in the waters of a navigable river, and that those waters do not, as against the Government, attribute to the value of such lands. It said:

> "If the owner of the fast lands can demand water-power value as part of his compensation, he gets the value of a right that the Government in the exercise of its dominant servitude can grant or withhold as it chooses. The right has value or is an empty one dependent solely on the Government. What the Government can grant or withhold and exploit for its own benefit has a value that is peculiar to it and that no other user enjoys." 350 U. S., at 228.

The Government, by determining to exploit its stream for its own benefit, "displace[d] all competing interests and appropriate[d] the entire flow of the river for the declared public purpose." *Id.*, at 225. In these circumstances, "[t]o require the United States to pay for this water-power value would be to create private claims in the public domain." *Id.*, at 228.

The *Twin City* and *Chandler-Dunbar* cases, *supra*, seem clearly to require the conclusion, on the facts here, that the easement to flood these lands had no value to the power company at the time the Government took it.

It was its failure to obtain a federal license to dam the river—not the taking of its easement to flow—that hurt the power company, for once the Government determined to construct the power dam for its own use and benefit no possibility remained that the power company could ever use the easement, and hence its entire value was gone.

To the Court's observation that "the Government's argument would mean, in a case like this one, that compensation could be denied the fee owner because he had already conveyed the flowage easement. . . . and denied the owner of the easement because it was valueless against condemnation by the United States," the law requires us to say: Exactly so. The fee owners had sold and conveyed, for consideration satisfactory to them, the right permanently to flood these lands and no longer owned any interest in *that estate*. Indeed, they claim none. That estate in these lands was not taken by the Government from them. Not having taken anything from the fee owners, the Government does not owe them "just compensation" for anything. This also demonstrates the Court's further error in remanding the case for "apportionment" of the "damages" between the owner of the easement and the owners of the fee. In no event could there be anything to apportion to the fee owners. What the Government took was the easement. It belonged solely to the power company, and if it had any value at the time it was taken by the Government, that value belonged solely to the power company. But the easement had no value to the power company at the time it was taken by the Government. The power company's sole estate in these lands was an easement to back the river's

waters upon them. The exercise—and hence the value—of that easement was always contingent upon the prior issuance of a federal license authorizing the private damming of the river. No such license was ever issued. Instead, the Government determined to construct the dam and appurtenant facilities for its own benefit. This left no possibility that the power company could ever dam and back the river's waters upon these lands, and inasmuch as it had no right to use them for any other purpose, it seems clearly to follow that the easement was wholly without value to the power company for any purpose at the time the Government took it.

It is of course true, as already stated, that if the Government had taken the right to flow these lands from the owner of the unencumbered fee, the law would require it to pay his damages resulting from that deprivation of his right to make agricultural and similar surface uses of these lands. *United States v. Kansas City Ins. Co., supra.* From that premise it is argued that the owner of the easement to flow, having acquired it from the owner of the unencumbered fee, "stands in the shoes of his predecessor in title" and is thus entitled to like damages from the Government when it takes that easement from him. But that premise is erroneous. The error lies in the obvious fact that the power company never acquired or owned any right to make agricultural uses of these lands. Hence it did not suffer, and is not entitled to recover, any damages for the destruction of such uses. Quite distinguishable from an unencumbered fee, the only estate of the power company in these lands was the right to store the river's waters upon them. Once the Government determined to construct the power dam for its own use no possibility remained that the power company could ever use the lands for that purpose and, having no right to use the lands for any other purpose, it must follow that the easement was wholly without value to the power

company for any purpose at the time the Government took it.

We believe that the Fifth Amendment's command that "private property [shall not] be taken for public use, without just compensation" should be liberally construed in favor of the condemnee, but that does not mean that the Government should be required to pay something for nothing.

For these reasons, we think the judgment should be reversed with directions to enter judgment for the Government.